

A
TREATISE
ON
THE LAWS
OF
Commerce and Manufactures,
AND
THE CONTRACTS
RELATING THERETO:
WITH
AN APPENDIX OF PRECEDENTS.

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VOL. III.

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ADVERTISEMENT

TO

THIRD VOLUME.



THE Contents of this Volume will appear from the following Table and concluding Index, and correspond with the Arrangement of the Work proposed in the Preface, (ante, vol. 1. page xiv.) It is hoped that this Part of the Work will be found practically useful to the Profession, and that it will also afford to Students, whether of Law or Commerce, a systematic View of all the most usual Contracts and Liabilities affecting the private Interests of Trade.

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A

Treatise



ON

COMMERCIAL LAW.

CHAP. I.

Of Contracts in general.—The Parties thereto.—Consideration on which founded.—Thing to be done.—Forms and Requisites.—Construction.—Performance, and how suspended, vacated, or excused Performance.

HAVING, in the preceding volumes, considered the various modes in which the commerce of this country is affected, not only by the law of nations, but also by those municipal institutions of our own country, which are of a public and general nature, and which form the basis of that commercial intercourse which takes place between individuals, we propose now to enter upon the last, and (for practical purposes) most important division of our subject, which relates to commerce itself, strictly so called, as contradistinguished from those measures of state policy by which it is secured and protected. In this division of the subject, we propose first to take a general view of mercantile contracts, as affected by those municipal regulations, which are established, independently of all political purposes, for the government of individuals in their dealings with one another,—a branch of the subject which is at once interesting and important, not only from its daily and practical utility, but from the numerous laws which are to be found respecting it. We shall then proceed to take a minute and particular view of every subject connected with private trade.

DIVISION OF
SUBJECT.

In order to afford a distinct and comprehensive view of the law affecting contracts, we shall in this chapter consider, *first*, the definition of a contract. *Secondly*, The several descriptions of contracts. *Thirdly*, The capacity of the contracting parties. *Fourthly*, The consideration upon which the contract must be founded. *Fifthly*, The subject matter of the contract. *Sixthly*, The mode or form in which the assent of the contracting parties is to be testified. *Seventhly*, The interpretation and legal operation of the contract. *Eighthly*, Its practical execution or completion, by delivery, payment, or tender; and, *Ninthly*, How a contract may be suspended, altered, cancelled, or excused in the non-performance.

1ST. DEFINITION
OF THE
TERM CONTRACT, &c.

The stipulations between individuals are known by different names, as contracts, agreements, bargains, undertakings, or promises; and when under *seal*, have different denominations, as deeds generally, or, in particular cases, bonds, &c. (1). The term *contract* is said to be derived from *con* and *trahere*; being so called from the concurrence or union of parties, which is essential to the existence of a contract. It is said to denote reciprocal stipulations between two or more persons, binding themselves to one another for a certain consideration on each side (2). The same idea of mutuality is conveyed by the word *agreement*, which is said, in Plowden, to have come from the Latin, being *quasi aggregatio mentium*, a co-operation of minds; but however accurate this statement may be as a definition, it is incorrect as a derivation. The word *agreement* may with greater reason be traced to the French *agrément*, denoting, that each party contracts *à son gré*, that is, conformably to his own will; the concluding syllable of the word being simply a terminational addition, according to the form of the language, but not possessing any peculiar force or meaning of its own (3). The etymology of the word is, however, of the less consequence, because there has been no dispute about the meaning of the term. No one will be found to deny, that every agreement requires a co-operation of at least two contracting parties, physically and morally competent to give an assent to the agreement (4). So

(1) See post as to the several sorts of contracts.

(2) *Sidenham v. Worlington*, 2 Leon. 225. Johnson's Dict. tit. Contract.

(3) See upon this subject, *Fell on Merc. Guar.* Co. Lit. 110 a. in notes, and the use of the word *Gré*

in the stat. 25 Edw. 3. st. 5. c. 19. stat. 4. c. 3.

(4) *Com. Dig.*, Agreement, A. 1. Plowd. Com. 5. a. 6. a. 2 Bla. Com. 442. *Wain v. Walters*, 5 East, 16. *Saunders v. Wakefield*, 4 Barn. & Ald. 595. Johnson's Dict., tit. Agreement.

strongly is the obligation of mutuality implied by the law of I. DEFINITION.
 England, as essential to the validity of a contract, that, in general, as will be seen hereafter, no contract, not under seal, is valid, unless it be founded on a valuable consideration; and therefore it should seem, that where the term agreement is used in a statute, or on any other legal occasion, it imports the consideration for a promise, as well as the promise itself; and therefore, where the statute against frauds(1) requires that a memorandum of the *agreement*, whereby a party stipulates to pay the debt of another, shall be reduced into writing, and signed by him, not only the promise, but also the consideration for it moving from the other party, must appear on the face of the memorandum(2). The term *bargain* is sometimes used, and particularly with reference to contracts of sale; it is derived from the French, and imports a contract or agreement concerning the sale of something(3). The term undertaking, or promise, denotes only the engagement of one of the parties to the other, and not the engagement of both parties(4). In the present chapter it is proposed to examine, in their natural order, the several parts of the most comprehensive definition of a valid contract, in its legal acceptance, viz., “an *agreement founded on a sufficient and legal consideration to perform some act which the law does not forbid, or to omit some act, the performance of which the law does not enjoin.*” But first it will be useful to point out concisely some leading distinction between the different kinds of contracts.

A contract is either express or implied. The phrase *express contract* requires little definition: it explains itself. It is distinguished from an implied contract, by the circumstance of its resting on no imaginary or uncertain inferences of the probable intention of the parties, but on an actual declaration of that intention, made in *direct terms*. Express contracts are contracts agreed in fact, and implied contracts are contracts presumed in law. It is not, however, absolutely necessary that an express

II. OF THE SEVERAL DESCRIPTIONS OF CONTRACTS:—
 Implied and express by parol; whether verbal or in writing; by deed, or specialty; and of record.

(1) 29 Car. 2. c. 3. s. 4.

(2) Wain v. Walters, 5 East, 16. See Saunders v. Wakefield, 4 Barn. & Ald. 595., and the observations there made by the Court as to the meaning of the term Agreement, &c.

(3) 29 Car. 2. c. 3. s. 17. Johnson's Dict., tit. Bargain.

(4) Wain v. Walters, 5 East, 17. Sidenham and Worlington's case, 2 Leon. 224, 5. See Saunders v. Wakefield, 4 Barn. & Ald. 595.

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'contract should be formally testified in precise words or writing. Thus, in the familiar instance of a sale by auction, where the purchaser having resorted to the place of sale, and having named the price at which he is desirous of purchasing, the bargain is concluded by the falling of the auctioneer's hammer (1). So a covenant may be inferred from the terms of an exception in a lease (2). At first sight it may appear, that these express contracts, which are thus construed in a larger sense than the literal meaning of the words import, are not to be distinguished from contracts merely implied. But the difference is this: that an express contract, though construed in a larger sense than the terms of it literally import, is still a contract gathered merely from the express words of the parties themselves, who are bound to know the meaning which the law will attach to such express words. Whereas, on the contrary, an *implied* contract is one, arising from no words of the parties, direct or indirect, but presumed by the law from certain tacit acts. As if a party pass through a turnpike-gate, or have his goods weighed at an established legal beam, or if a claim for general average arises (3), here the party is under a legal liability to pay, and from that liability his contract to pay will be implied. Yet there is no greater compulsion in these cases of *implied* contract than in the last-mentioned cases, where the contract is *express*. For as, in the cases of express contract, it was notorious that the law would construe certain words in a certain peculiar manner, and thereby raise an *express* contract from them; so, in these cases, it is equally notorious that the law will construe certain acts as tantamount to direct expressions, and thereby raise an *implied* contract.

Where there has been an *express* stipulation, the law will not, whilst it subsists, allow a contract to be implied—*expressum facit cessare tacitum* (4). For the words of the parties themselves are the best possible criterion of their intention; and any *implication* of a contract, different from that expressed, would be repugnant, in all probability, to their real meaning. Therefore,

(1) Payne v. Cave, 3 T. R. 149.

(2) The Duke of St. Alban's v. Ellis, 16 East, 354, 5. Seddon v. Senate, 13 East, 78. Com. Dig., Covenant, A.

(3) Berkley v. Presgrave, 1 East, 226.

(4) Toussaint v. Martinnant, 2 Term Rep. 105. Cutler v.

Powell, 6 T. R. 322. Cook v. Jennings, 7 T. R. 384, 5. Cowley v. Dunlop, 7 T. R. 568. Buckler v. Buttivant, 3 East, 86. Moorsom v. Kymer, 2 M. & S. 316.

although a contract will sometimes be *presumed*, where *none* has been made, and that, too, even against the express declarations of the party who is to be bound by it, as in the case of a husband who is liable for his wife's necessary expences; yet where any *express* contract has been made *at all*, to *that*, and to *that only*, the parties must resort for their remedy; and therefore, where a sailor, hired for a voyage at a certain sum, died before the voyage was completed, it was held that the executor could not abandon the express agreement, and proceed for a compensation proportionate to the service performed, because the agreement was originally for the whole or nothing; and as the event had precluded the recovery of the whole, the executor was not entitled to receive any remuneration whatever. (1) The law however will in some cases imply a contract collateral and not repugnant to the express contract; as where a lease has been executed silent as to the terms of giving up a farm at the expiration of the lease, in which the law will imply a contract on the part of the landlord to pay according to the custom of the country. (2)

These are the chief points of distinction between express and implied contracts. *Express* contracts may arise in all the various forms which necessity or convenience may suggest in the dealings of men: *implied* contracts are of a less various nature, as depending on the operation of law. It requires little reflection to perceive, that the *acts* by which bargains are thus *implied*, must be of course less variant than the *words* in which they may be *expressed*.

In point of *form*, contracts are three-fold; by *parol*, by *specialty*, and by matter of *record*. Those most in use in commercial affairs, are *parol* or simple contracts not under seal. All contracts are called *parol*, unless they be either specialties, that is, deeds under seal, or be matter of record. A written agreement not under seal, is classed as a *parol* or simple contract, and is usually considered as such, just as much as any agreement by mere word of mouth. For, as observed by chief baron Skynner (3), there is at common law no such class of contracts as contracts in writing contradistinguished from those by *parol* or *specialty*.

(1) Cutler v. Powell, 6 Term 546. 2 Bar. & Ald. 746.
R. 320. 2 T. R. 105. 3 East, 80. (3) Rann v. Hughes, 7 Term
(2) Hall, C.N.P. 197. 3 Moore, Rep. 350. Plowd. 308.

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If they are merely *written*, and not specialties, they are *parol*. There are, indeed, distinctions between the two kinds of simple contracts under the statute of frauds, which we shall hereafter consider, and which render it necessary that certain descriptions of simple contracts should be in writing, and sometimes signed. But though *written*, they still continue, like *all other* contracts not under seal nor of record, to be considered merely as in the nature of *contracts by parol*.

Bonds, deeds, and the other contracts under *seal*, which are called *specialties*, are less frequent, and of a higher order, than contracts by *parol*, and greater solemnity and accuracy are essential to their validity. Every specialty must, it is said, be either written or printed on paper or parchment, and not upon wood, leather, linen, cloth, stone, the bark of a tree, or the like; the materials selected being those which, if written upon, are the least subject to be vitiated, altered, or corrupted (1). It seems that it may be in any language or character whatever (2). After the deed has been duly committed to writing, it must be *sealed*; but the signature of the name of the party at the foot is not in general material. It is necessary that the deed should be *delivered* (3), except in the case of a deed executed by a corporation, in which case the affixing of the common seal is sufficient, without a formal delivery (4). Reading over the deed is not essential to its validity, for if the party execute without hearing it, or desiring that it may be read to him, yet it binds him; but if a person blind or illiterate should execute a deed falsely read, or the sense of which was declared to be different from what it really was, it would not be binding (5). No date is necessary, for the deed will take effect from the delivery, nor are witnesses essential; the attestation being rather to preserve the evidence than to constitute the essence of the deed (6); and even where the names of two fictitious persons had been subscribed by way of attestation, the judge permitted the plaintiff who had received

(1) Co. Lit. 171 b. 35 b. 229 a. 2 Rol. Abr. 23. l. 50. Dav. 44 b. Plowd. 308. b. Vide as to printing, 2 Bla. Com. 297. 2 Maule & Selw. 286, 88. 167.

(2) 2 Bla. Com. 297. 4 Cruise Skinner, 158. 2 Atk. 327. 8 T.R. Dig. 28. 147. 4 Cruise Dig. 31.

(3) Co. Lit. 35. b. 171. b.

(4) Com. Dig., Fait., A. 3.

(5) 2 Coke, 3, 9. 12 Coke, 90. (6) Com. Dig., Fait. Phil. on Ev. 413 to 421. 4th ed.

the deed from the defendant in that deceitful shape, to give evidence of the hand-writing of the defendant himself. (1)

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The highest kind of contracts are those of *record*; such as judgments, recognizances of bail, statutes merchant and staple, and other securities of the same nature, entered into with the intervention of some public authority; as, for instance, before a court of record, or a judge thereof, the lord mayor, or other competent person. On account of which mode of authenticating the contract, it is invested with certain privileges and advantages not incident to other contracts, and which will hereafter be noticed.

We shall find some important distinctions between the different descriptions of contracts, which have occasioned some to be considered higher and preferable securities to the others. These distinctions almost entirely depend on the more deliberate mode in which the superior contract is entered into. A simple or penal contract is considered as made without so much deliberation as a deed; and a contract of record is considered as still more cautiously and formally framed, as well as to have been sanctioned by the judge or magistrate before whom it was acknowledged. Simple contracts are often entered into by men unadvisedly, and without sufficient deliberation, and therefore the law has provided, that such a contract shall not bind without considerations; but where the agreement is by deed, there is more time for deliberation; and as it has been observed, with great simplicity, but, at the same time, with equal truth, when a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and, lastly, he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the

(1) *Tassel v. Brown*, Peake's Neale and others, id. 146. *Fitz-Rep.* 23.; and see *Grellier v. Gerald v. Elsee*, 2 Campb. 635.

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party, and are adjudged to bind him, without examining for what cause or consideration they were made (1). It is competent to the parties to most stipulations to secure the payment of the same money, or performance of the same act, either by simple contract, by deed, or by record; and the differences between the legal effect of each mode of contracting depends on the form, and not on the subject matter of the contract. We will now consider the principal legal distinctions between each of these modes of contracting.

Distinctions between each description of contract.

The principal points in which a deed differs in effect from a parol contract are, 1st, That the want of consideration constitutes no defence at law to an action on such deed (2); and though in equity relief may sometimes be had in cases of surprise or catching bargains, or in favour of creditors, yet the mere circumstance of a bond or deed having been given voluntarily without consideration, constitutes no ground for relieving the party himself (3). Whereas in support of any proceeding on a simple contract, the creditor must prove that it was founded on a sufficient consideration (4); and though the defendant in an action on a deed is at liberty to avail himself of any illegality in the consideration or transaction, yet it is incumbent on him to state the objection with precision in pleading; whereas in an action on a simple contract, such ground of defence may be given in evidence under the general issue (5). 2dly, That in pleading a deed, it is not necessary to shew that it was founded on any consideration, except in setting forth conveyances operating under the statute of uses (6); whereas a declaration on a simple contract will be bad in arrest of judgment, unless it appear therefrom that there was a consideration co-extensive with the promise (7). 3dly, That the party to a deed is in most case estopped or precluded from controverting any statement therein, or to shew that it was executed with a different intent or object to that which the deed

(1) *Sharrington v. Shotton*, Plowd. 308, 9. *Fallowes v. Taylor*, 7 T. R. 477. *Bunn v. Guy*, 4 East, 200. *Fonbl. on Eq.*, 2d ed. 347. n. f. *Toller*, 1 ed., 222, 3.

(2) *Ante*, 7.

(3) *Fonbl. on Eq.*, 2d ed. 347., n. f. *Toller*, 1 ed., 222, 3.

(4) *Jones v. Ashburnham*, 4 East, 403. *Rann v. Hughes*, 7 T. R. 350. 7 Bro. P. C. 550.

Parker v. Baylis, 2 B. & P. 77.

(5) *Ferrall v. Shaen*, 1 Saund. 295. *Tate v. Wellings*, 3 T. R. 538. *Petrie v. Hanney*, 3 T. R. 424. 2 Wils. 347. 1 Bla. R. 445. 7 T. R. 477.

(6) 1 Hen. Bla. 261. 2 Stra. 1229.

(7) *Hutchinson v. Newson*, 7 T. R. 348. *Jones v. Ashburnham*, 4 East, 455.

itself imports (1), except indeed in cases of duress, fraud, or illegality, which defences the law admits, notwithstanding the security has the appearance of having been deliberately framed (2). 4thly, That the efficacy of a stipulation by deed, cannot be affected or altered at law by any subsequent simple contract, nor can the party be discharged or released from the obligation of a deed by any subsequent contract, unless by a release under seal (3). 5thly, That a deed binds the heir when named (4), and a devisee of real estate may be sued in debt, though not in covenant, on such a deed (5). Whereas a simple contract creditor has no remedy at law in any case, against the real estate of his deceased debtor, though in some cases by marshalling the assets (6), or where the debtor died a trader, relief may be obtained in equity (7). 6thly, That a deed is entitled to preference, except as to rent due on a parol demise, over simple contract debts, in the course of payment of a testator's debts (8); and though this rule does not obtain in case of bankruptcy, when all creditors receive a dividend *pari passu*, yet by means of a mortgage and some other deeds, some specific security may frequently be obtained, or right to prove acquired, which, even in that event, places one creditor in a better situation than he would otherwise have been. 7thly, That a deed is not affected by the statute of limitations, which renders it necessary for a simple contract creditor to proceed within six years after his cause of action accrued (9). 8thly, That in pleading a deed it is in general necessary to make a profert, as it is technically termed, of the deed, or to state upon the record some excuse for the omission (10). 9thly, That in case of a deed, when a profert is necessary, the other party is entitled to an oyer and copy (11); a right which does not in general exist in case of simple contracts (12). 10thly, That if a deed be given expressly to secure a pre-existing

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(1) 2 Bla. C. 295. Cowp. 3 99. Wilson v. Knubley, 7 East, T. R. 424, 438. Com. Dig. 128.

Estoppel. 1 Saund. 216. n. 2. Willes, 9.

(2) Per Buller, J., Petrie v. Hannay, 3 T. R. 418.

(3) Co. Lit. 222 b. Sillber v. Holliand, 3 T. R. 590. Braddick v. Thompson, 8 East, 346.

(4) Bac. Abr. Heir and Ancestor, F. 2 Saund. 136. Plowd. 439, 441. 2 Saund. 7. n. 4.

(5) 3 & 4 W. & M. c. 14. Bac. Ab. Heir, F. 1 P. Wms.

(6) 3 Woodes. 488.

(7) 47 Geo. 3. sess. 2. c. 74.

(8) 2 Bla. C. 465. Toller, 1 ed. 221. Cox v. Joseph, 5 T. R. 307.

(9) Cowp. 109. 1 Saund. 37, 8. 21 Jac. 1. c. 16. Tidd. 6th ed. 19.

(10) 10 Co. 92. b. 1 Chitty's Plead. 351. 3 T. R. 151. 4 East, 585.

(11) 1 Saund. 9. n. 1.

(12) Tidd. 6th ed. 618, 9.

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simple contract debt due from the obligor, it will at law merge the latter, and prevent him from suing upon the same (1); though if the deed be given as a collateral security, or by a third party, it will not have that operation. (2)

Debts, or *contracts of record*, being, as we have seen, sanctioned in their creation by some court or magistrate having competent jurisdiction, have certain particular properties distinguishing them as well from simple contracts as from specialties.—1st, These debts or contracts cannot in pleading be impeached or affected by any supposed defect or illegality in the transaction on which they were founded; and if a judgment be erroneous, that circumstance will afford no answer to an action of debt upon it, and the only course for the defendant is to reverse it by writ of error (3); and though third persons, who have been defrauded by a collusive judgment, may shew such fraud, so as to prevent themselves from being prejudiced by it (4), the parties to such judgment are estopped at law from pleading such a plea, and must in general apply for relief to a court of equity (5). There is, however, one instance in which a party may apply to the common law court to set the judgment aside, viz. where it has been signed upon a warrant of attorney given upon an unlawful consideration, or obtained by fraud, in which case, as this is a peculiar instrument; affording the defendant no opportunity to resist the claim by pleading, and frequently given by persons in distressed circumstances, the court will afford relief upon a summary application (6). Another peculiar property of a contract of record, — its existence, if disputed, must be tried by inspection of the record, entry of recognizance, &c., and not by a jury of the country (7). But notwithstanding, since the act of union, an Irish Judgment is a record, yet it is only proveable by an examined copy on oath, and therefore it is only triable by a jury (8). Another quality,

(1) Drake v. Mitchell and others, 3 East, 258, 9. Cro. Car. 415.

(2) Drake v. Mitchell and others, 3 East, 251. Com. Dig. Accord. 6 Term Rep. 176, 7. 2 Leon. 110.

(3) Moses v. Macferlan, 2 Burr. 1005. Hayward v. Ribbans, 4 East, 311. 2 Lev. 161. Gilb. on U. & T. 109. Gilb. Debt, 412. Yelv. 155. Tidd. 6 ed. 1152.

(4) 13 Eliz. c. 5. Moore v.

Bowmaker, 2 Marsh. 392. 7 Taunt. 97.

(5) Id. *ibid.* Mathews v. Lewis, 1 Anstr. 8.

(6) Dougl. 196. Cowp. 727. 1 Hen. Bla. 75. Semble not so in Exchequer, Mathews v. Lewis, 1 Anstr. 7, 8.

(7) Tidd. 6 ed. 797, 8.

(8) Collins v. Ld. V. Mathew, 5 East, 473.

and one of the most important is, that a judgment, when docketed, binds the land as against subsequent purchasers (1), and such a judgment and recognizance is entitled to preference to a specialty and other debts of an inferior nature (2). Lastly, if a judgment be obtained expressly for a simple contract or specialty debt, and not as a collateral security, the inferior demand is merged, according to the rule *transit in rem judicatam*; but if the judgment were obtained merely as a collateral security, the creditor retains an election to proceed either on the judgment or inferior security (3). This concise comparative view of the different kinds of contracts, and their relative effect, will here suffice. We shall hereafter, when we consider the securities incident to trade, have occasion to examine more particularly the different contracts which are usually adopted in commercial affairs.

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Having thus considered the definition and signification of the terms contract and agreement, in their most comprehensive sense, and the general sorts or descriptions of contracts, and their respective distinguishing properties, we will now proceed to consider, in their natural order, the different parts of the comprehensive definition already given, and which we shall find in general affect every description of contract (4). They consist of, 1st, The agreement; 2dly, The consideration; 3dly, The thing to be done or omitted.

Parts of definition.

1st, An agreement or consent is an act of reason, accompanied with deliberation of the mind, weighing as in a balance the good and evil on both sides. It imports, 1st, A moral power of consent; 2dly, A physical power to consent; and, 3dly, A serious and free use of those powers (5). There must necessarily be at least two parties to a contract, of sufficient mental ability to contract, and each of the parties must, in fact, assent, or there is no contract. We will, under this head, consider the capacity of the contracting parties, and in whose favour a contract may be made, and the nature of the assent required by law. All persons are by our law capable of contracting for themselves, except infants, ideots, lunatics, persons rendered insensible by intoxication, femes covert, and persons under duress or illegal imprisonment; and these incapacities we will separately consider. (6)

III. CAPACITY
TO CONTRACT.

(1) Tidd. 6 ed. 966, 7.

258.

(2) 6 T. R. 384. Tidd. 6 ed. 967.

(4) Powel. 1 Fonbl.

(5) 1 Fonbl. 45.

(3) Drake v. Mitchell, 3 East,

(6) 1 Powell, 10. 1 Fonbl. 67.

III. CAPACITY
TO CONTRACT.
1. Infants.

The circumstances which accompanied the formation of a contract are in general material to be attended to, in order to ascertain its force and efficacy. For as some securities, by which the intention of the contracting parties may be declared and evidenced, are in their own nature obligatory, so in other cases, where no such securities exist, the consideration or motive for entering into the contract must be regarded, in order to determine whether it is obligatory or not. Of the three species of securities, the general properties of which have been already pointed out, namely, such as are of record, under seal, or not under seal, it will have been observed, that the two former species, on account of the solemnities observed in their creation, are entitled to certain privileges, which are denied to other contracts of a less solemn and deliberate description. So a material distinction exists with respect to the binding force of each of these securities on a person under age. And in considering the law by which it is to be determined, whether an infant's contract is obligatory or not, we propose to examine the subject in two points of view, viz.: *first*, with reference to the *security* given; and, *secondly*, the *consideration* for the contract. First, we shall consider the effect of a contract of record as a statute merchant, statute staple, or recognizance, given by an infant; afterwards, of the effect of a bond, single bill, bill of exchange, promissory note, or account stated; secondly, of a contract by an infant for necessaries, or instruction; of a trading contract; of a cause of action *ex delicto*; of an instrument which the infant was compellable, in law or equity, to execute; and, lastly, we shall treat of the consequences of the invalidity of an infant's contract, how it may be avoided or confirmed, and whether the invalidity of it can be taken advantage of by third persons.

A contract which the law denominates *of record*, as for instance, a statute merchant, statute staple, or recognizance, on account of its being acknowledged in a court of record, or before a legal authority appointed for the purpose, is absolutely binding upon an infant, unless he should reverse it by *audita querela* during his minority (1). The securities just mentioned being of a judicial nature, and entered into before persons who are presumed in law to be competent judges of the sufficiency of the parties to them, it would be beneath the dignity of the tribunal

(1) Co. Lit. 380. b. Moore, —675. 2 Bulstr. 320. 12 Co. 76. 2 Rol. Abr. 15. 2 Inst. 483 122. Yelv. 155. 3 Mod. 229.

to allow them to be questioned by any other means than by an *audita querela*, brought expressly for the purpose; upon which process the question of infancy is to be tried by the inspection and examination of the court itself before which the complaint is preferred, and not by a jury (1). Whether, indeed, if the infant should come of age before he has taken any measures for reversing the security, it may not be afterwards set aside, seems at one time to have been questioned (2); but it is now fully settled, that if he do not reverse it during his minority, the security becomes absolutely binding; because the opportunity of trying by inspection is lost, and the law will not allow the question of infancy to be referred as matter of fact for the consideration of a jury, where it would operate to defeat a judicial act (3). So if an infant proceed by *audita querela* to reverse a recognizance, and the judges, upon inspection, find him within age, and adjudge the recognizance to be void, and discharge the infant; but the conusee afterwards reverses the judgment in the *audita querela* for error; and before the reversal, the cognizor attains his full age, no fresh *audita querela* can be brought to reverse the recognizance; although the court below, before which the first *audita querela* was brought, decided, on inspection, that the party was an infant at the time of entering into the contract (4). For the better opinion seems to be, that where a second *audita querela* is brought, whether it is before the same or before another court, the judgment upon it must be grounded upon a fresh inspection, and cannot depend upon the inspection which was had when the first writ of *audita querela* was proceeded upon (5). But if, on the infant's age being inspected by the judges, it be found that he is within age, and be recorded accordingly, the formal judgment of reversal may well be given after the period of infancy is expired, and although the infant should happen to die before judgment has been entered (6). The same rules apply with regard to a fine levied, or a recovery suffered by an infant. An infant is incapable, by law, of being

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(1) See last note.

(2) See Co. Lit. 380. b. Vide Cro. Jac. 59. Yelv. 88.

(3) Co. Lit. 380. b. 2 Inst. 673. Com. Dig. Infant, C. 11. and cases in next note.

(4) 1 And. 25. 228. n. Bendl. 80. pl. 123. Dyer, 232. pl. 9. Moore, 75—460. 2 And. 158.

10 Rep. 43. a. Noy, 16. Yelv. 88. 2 Bulst. 320. F. N. B. 105; but see Randal v. Wale, Cro. Jac. 59.

(5) Vide Yelv. 88. Com. Dig. Trial, B. 1. But see also Cro. Jac. 59. Co. Lit. 380. b. in margine.

(6) Moore, 884. Keswick's Case, Co. Lit. 380. b.

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sognizor in a fine. But if an infant should be permitted to levy one, and no measures be taken for a reversal of it (which must, in this case, be by writ of error, and not by *audita querela*) during his minority, the fine will for ever afterwards stand good; because, in this case also, the fact of infancy can only be tried by an inspection of his person in open court; *non testium testimonio, non juratorum veredicto sed judicis inspectione solummodo*(1). If the fact of infancy were permitted to be tried by any other mode than by the personal inspection of the infant in a court of record, averments might be made many years after a security of this nature had been entered into, that the person who acknowledged it was at the time an infant, by which means the credit of such instruments would be much lessened, and great confusion introduced (2). Where, indeed, an infant does a judicial act by attorney (as in cases where personal appearance in court is not required by law), the record may be avoided at any time by writ of error, for, as an infant is incapable of appointing an attorney, the foundation of the proceeding fails; and it may be tried by a jury, whether the party was an infant or not at the time of appointing the attorney (3). Nor can any analogy be drawn between a statute merchant or statute staple and the ordinary case of a warrant of attorney to confess a judgment, which takes place *inter privatos*, and would, if given by an infant, be ordered to be delivered up, on an application to the court; for a warrant of attorney to confess judgment, given by an infant, is absolutely void (4). An *audita querela* lies, although the statute may not have been certified in any court (5). On the trial by inspection, the court may avail themselves, not only of the personal appearance and demeanour of the infant, but also of an examination of him upon oath, on the *voir dire*, and the testimony of his parents, and any vouchers which may be necessary. (6)

(1) 1 Inst. 380. b. 12 Rep. 123.

(2) 12 Coke's Rep. 122.

(3) Tidd's Practice, 5 ed. 1161. 1201. Appearance of plaintiff infant by attorney in personal actions aided by 21 Jac. 1. c. 13. Tidd. 946.

(4) *Saunderson v. Marr*, 1 Hen. Bla. 75. *Chambers v. Burnett*,

Imp. C. P. 612. Tidd. 572.

(5) And. 228. 3 Bulstr. 307.

Com. Dig. Aud. Quer. E. 2., and see that it lies by an infant bail after judgment given on the second scire fa. Yelv. 155. Cro. Jac. 646. Co. Ent. 87, 88.

(6) 2 Roll Abridg. 573. Palmer, 326. See 3 Mod. 229. *Lloyd v. Eagle*, Carthew. 278.

Next in degree to these securities which are classed in law as matters of record, are those which take effect from their being sealed and delivered, as deeds and specialty contracts. These last are not as such absolutely binding on an infant; for although, in general, a party to a deed is estopped from shewing that it was not founded upon a sufficient consideration, yet in the case of an infant, the nature of the debt, or other consideration which formed the inducement for his entering into it, is in all cases to be regarded, in order to ascertain whether he is liable upon it or not. Thus, an infant may give a single bond or obligation, without a penalty, for the payment of a sum due from him for necessaries (the meaning of which term will be explained hereafter) (1). Therefore, if a single bill be given for necessaries, it operates as a merger of the simple contract debt; and if a promise should be made by the debtor after he comes of age, an action is not maintainable on this promise, but it should be founded on the deed (2). But a bond or writing, with a penalty (3), or conditioned for the payment of money and interest (4), is absolutely void, because the law considers that such a security is apparently prejudicial to the infant, and that it might be the means of obliging him to pay more than is really due, in respect of those debts which the law allows him to contract. And although, by some statutory provisions, the plaintiff, in an action on a bond with a penalty, may be compelled to accept the sum really due, in discharge of the action; yet to many purposes the penalty constitutes the debt at law, and therefore the law considering the infant's incapacity to bind himself in a contract with a penalty, remains unchanged. If, therefore, a bond with a penalty be given for necessaries, the original debt is not merged, and the creditor may sue for it accordingly; a bond with a penalty can only be confirmed after the debtor has attained his full age, by another deed of as great an efficacy as the bond itself (5). So with respect to those simple contract securities which carry in themselves internal evidence of a consideration, they are not absolutely binding upon infants; but if they are available at all, the nature of the debt or consideration

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Deeds, bonds,
and other Con-
tracts of Infants,
whether valid or
not.

(1) See Co. Lit. 172. and note 2 there. 1 Rol. Abr. 729. pl. 8. Moore, 679. Cro. Eliz. 920. Godb. 219. March, 145. Capper v. Davenal, Buller's Nisi Prius, 155—178. 3 Keb. 798.

(2) Buller's Nisi Prius, 155.

(3) Co. Lit. 172. a. Bayliss v. Denby, 3 M. & S. 477. and see as to interest, 2 Inst. 88, 9. st. Mer-ton, c. 5. 4 T. R. 363.

(4) Id. *ibid.* Fisher v. Moulsey, 8 East, 330.

(5) 3 M. & S. 477.

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for which they were given must be the criterion of their validity. Indeed it has been considered, that a bill of exchange, or negotiable security, is in no case binding upon an infant, even as between the original parties, and although given for necessities (1); and it is clear, that it is not binding as against the infant in the hands of a third party, to whom it may have been negotiated (2). If given for a debt contracted in trade, it is clearly invalid as against the infant, even between the original parties (3). The rule, however, does not apply to enable an acceptor to avail himself of the infancy of the drawer, in answer to an action brought by the indorsee (4); and if a bill be accepted after the infant has attained his full age, it is of course available against him, although drawn during his minority (5). But an infant is not liable on an account stated; for the law will not give him credit for accurate computation (6). Nor, as it should seem, is he liable on a promissory note, either as being negotiable or as affording evidence of the existence of a debt (7). To say that an infant is liable upon an instrument made during his minority, which operates as an admission of a debt, would defeat the laws which are intended for his protection. It seems clear, therefore, that he is not concluded by such an admission, but that the consideration may be entered into; and that if infancy should be pleaded, the evidence to support the security must be given by the party seeking to enforce it.

The nature of the debt, or of the consideration for the agreement, being thus established as the criterion of the infant's liability on a contract *in päs*, that is, on one which is not of record, we propose to consider for what things an infant may or may not make himself liable on such a contract. The distinction has been said to be, that those contracts, which are necessarily beneficial to an infant, are absolutely binding upon him, as well during his minority as afterwards; but that all others are either void or voidable. And, first, of those contracts which the law

(1) *Williamson v. Watts*, 1 Campb. 552, 553. note. 4 Esp. 188. Holt, C. N. P. 78, 9. Sel. Nisi Prius, 4 ed. 287. See 1 T. R. 40. and Chitty on Bills, 5th ed. 22.
(2) See the cases collected, Chitty on Bills, 22.
(3) *Williams v. Harrison*, Carth. 160. 3 Salk. 197. Com. Dig. Enfant, C. 2. 4 Taunt. 468. 3

Id. 307.

(4) *Taylor v. Croker*, 4 Esp. 187.

(5) *Stevens v. Jackson*, 4 Campb. 164. 6 Taunt. 106.

(6) *Trueman v. Hurst*, 1 Ter. Rep. 40. see 2 Stark. Rep. 36.

(7) See the authorities, *supra* note 1.

considers necessarily beneficial, and which are therefore binding on the infant. An infant may bind himself, says Lord Coke, to pay for his necessary meat, drink, apparel,* necessary physic, and such other *necessaries*, and likewise for his good teaching and instruction, whereby he may profit himself afterwards (1). This rule is providently intended for the benefit of the infant; that he may be enabled to gain credit for such things as are suited to his degree and station. From the words which Lord Coke adopts, it may be collected, and is now settled law, that the term *necessaries*, as here used, is a relative one; and that whether an infant is liable or not upon any particular contract as for *necessaries*, must be determined by his age, fortune, condition, and rank in life. His liability is not, indeed, confined to such things as are merely necessary for his existence; nor does it extend beyond such as are suited to his circumstances (2). Thus, as it has been justly observed, a distinction is to be made, in considering whether articles are *necessaries* or not, between the son of a nobleman and a gentleman, or one in a more humble sphere; and also, in point of age and education, as between a person under age at college or in one of the inns of court (3). Liveries ordered by a captain in the army for his servant have been considered *necessaries* (4); but, in the same case, the defendant was held not liable for cockades furnished, at his request, to the soldiers of his company (5). Regimentals supplied to a member of a volunteer corps may be recovered for as *necessaries* (6). So, if an infant be married, he is liable for *necessaries* furnished to his wife and children, — their interest being considered as identified with his own (7). But articles furnished in order for the marriage are not regarded as *necessaries* (8). In a late case it was decided, that a chronometer could not be admitted into the rank of *necessaries* for a lieutenant in the navy, where the defendant was not in commission at the time it was supplied, and no circumstances appeared to justify the conclusion that it was necessary for him (9). The question, with respect to what things are *necessaries*, must be determined by

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| (1) Co. Lit. 172. a. | (6) Coates v. Wilson, 5 Esp. |
| (2) 8 T. R. 578. and see also | 152. |
| 2 T. R. 159. 4 T. R. 363. | (7) 1 Strange, 168. Turner v. |
| (3) Carter, 215. Bac. Abr. tit. | Frisby, Bul. Ni. Pri. 155. |
| Infancy and Age, I. 1. 3 vol. 594. | (8) Id. ibid. |
| (4) Hands v. Slaney, 8 Term | (9) Pecolles v. Ramsay, Holt's |
| Rep. 578. | Rep. 77. The article was charged |
| (5) Id. ibid. | at £68. |

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the actual, not the apparent, circumstances of the infant; and therefore it is incumbent on a party giving credit to him, to ascertain his situation; and to be prepared to prove it at a trial to the satisfaction of the jury (1). The rule of law upon the subject must be laid down in this, as in every other case, by the judge at the trial; but the question being compounded of matter of fact as well as of law is ultimately to be referred to the consideration of a jury. Where an infant, who was proved to have been in the employ of a bargemaster, was sought to be charged for clothes supplied to him, but no sufficient evidence was conceived to have been given that the defendant was in need of clothing at the time of the order, or that the articles furnished were suitable to his condition in life, or that he had any income to enable him to pay for them; for want of which proof the plaintiff was nonsuited: The nonsuit was afterwards set aside by the Court of King's Bench, on the ground that the question was not so purely and exclusively a matter of law, but that some consideration might, under the circumstances, have been submitted to a jury (2). As comprehended under the term necessities, in its legal acceptation, money advanced to an infant to release him out of custody from process of execution, may be recovered back (3); or money advanced to release him from custody under mesne process, provided the debt for which he was arrested was contracted for necessities (4). And it seems, that a person under age is liable for money paid and expended for him in the purchase of necessities (5). But he is not liable for money lent, although laid out in the purchase of necessities; for, in this case, the contract arises on the loan, and the same principle which precludes him from binding himself by a contract for articles which are not necessities, must protect him also from liability for money lent which he might afterwards dispose of in any manner that he thought proper (6). The consequence of this doctrine is, that where part of a debt sought to be recovered is for money lent to an infant, and the residue for necessities,

Money lent, &c.

(1) *Ford v. Fothergill*, Peake's Rep. 229. 1 Esp. Rep. 211.

(2) *Maddox v. Miller*, 1 Maule & Selw. 738. *Hands v. Slaney*, 8 T. R. 578. *Fothergill v. Ford*, Peake, 229. *Borinsale v. Greville*, 2 Bla. Rep. 1325. *Rainsford v. Fenwick*, Carter, 215. *Macherell v. Bachelor*, Gouldsbrough, 168.

(3) *Clarke v. Leslie*, 5 Esp. 28.

Vide 13 East, 6.

(4) *Id. ibid.* See also as to a charge of bastardy, 8 East, 330. *Fisher v. Mowbray*.

(5) 5 Mod. 368. 10 Mod. 67. 12 Mod. 197. and case next note. See *Palmer's Rep.* 528.

(6) 2 Esp. 472. n. *Robert v. Rounth*, 1 Salk. 279.

but the latter demand is less than 40s., and the jury find damages for the plaintiff under that amount, the defendant residing in Middlesex at the time of the action brought, and liable to be summoned to the county court there, is entitled under the statute 23 Geo. 2. c. 33. s. 19. to enter a suggestion on the roll to that effect, entitling him to double costs of suit (1). But although an infant is not liable at law for money lent, even where he afterwards applies it to pay for necessaries, yet, in a court of equity, the lender will be entitled to stand in the place of the creditor for necessaries, and to recover there against the infant as the creditor might have recovered at law (2). Money advanced in order to enable the infant to live in habits of prostitution cannot of course be recovered back (3). Where an action was brought to recover back money which had been paid to liberate an infant from arrest in Scotland, it was held necessary for the defendant, in order to establish a plea of infancy, as a bar to the action, to show that the facts would have afforded a defence by the law of Scotland, in which country the cause of action accrued. (4)

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In deciding upon the infant's liability for necessaries, it frequently becomes necessary to consider whether they were not furnished on the credit of the parent, or of some other party under whose protection or power the infant lives. Where credit is given to the parent, and not to the infant, the infant is not liable; nor can he, while living under the roof of his parent, who provides every thing which in his judgment appears to be proper, bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries (5). With respect also to the parent, although the relation in which he has placed his child may *prima facie* appear to justify his being credited for necessaries, yet where he allows a son a reasonable sum for his expences, he is not liable for necessaries ordered by him (6); and where a tradesman has supplied a

Infants living
with their pa-
rents, etc.

(1) Bateman v. Smith, 14 East, 302.

(2) See 1 P. Wms. 558. 482. See 1 Vesey, 249.

(3) Clarke v. Leslie, 5 Esp. Rep. 28.; and see as to expensive dresses for a woman of the town, Campb. 553.

(4) Male v. Roberts, 3 Esp. Rep. 163.

(5) Per Gould, J., Bainbridge v. Pickering, 2 Bla. Rep. 1325. Borsdale v. Greville, per Bailey, J., Somerset Sum. Assizes, 1810, MS. Deale v. Leave, C. P. Lond. Sitt. after H. T. 51 Geo. 3. per Sir J. Mansfield, C. J. Ford v. Fothergill, Peake's Rep. 229.

(6) Crantz v. Gill, 2 Esp. Rep. 471.

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young man with clothes to an extravagant extent, he cannot sue the father for any part of his demand (1). In a late case, where a parent was sought to be charged for regimentals furnished to his son, the lord chief justice left it as a question for the jury to consider, whether they could infer that the order was given by the assent and with the authority of the father. He said, that "a father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied. Were it otherwise, a father who had an imprudent son might be prejudiced to an indefinite extent; and it was therefore necessary that some proof should be given that the order of a son was made by the authority of his father. The question, therefore, for the consideration of the jury was, whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority. He had placed his son at the military college at Harlow, and had paid his expenses whilst he remained there. The son, it appeared, then obtained a commission in the army, and having found his way to London, at a considerable distance from his father's residence, had ordered regimentals and other articles suitable to his equipment for the East Indies. If it had appeared in evidence that the defendant had supplied his son with money for this purpose, or that he had ordered these articles to be furnished elsewhere, either of those circumstances," the learned judge observed, "might have rebutted the presumption of any authority from the defendant to order them from the plaintiff. Nothing, however, of this nature had been proved; and since the articles themselves were necessary for the son, and suitable to that situation in which the defendant had placed him, it was for the jury to say, whether they were not satisfied that an authority had been given by the defendant." After his lordship had fully commented upon all the circumstances of the case, the jury found in favour of the plaintiff (2). I have understood, although the fact did not appear in evidence in this cause, that there is a useful regulation at the military college, that tradesmen shall not give credit to the young gentlemen there without the consent of their superiors. It should further be observed, that although in a particular case credit may have been given to a minor, and not to his parent, yet the latter may be responsible

" (1) *Simpson v. Robertson*, 1 Esp. Rep. 17.

(2) *Baker v. Keen*, 2 Stark. Rep. 501.

in a case of fraud. Thus where goods were supplied to a minor on a fraudulent representation by his father, that he was about to relinquish business in favour of his son, although the credit was given to the son, the father, dealing with the proceeds, was held responsible in *assumpsit* for goods sold and delivered. (1)

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The liability of an infant for instruction furnished to him, must, it should seem, be decided by the same rules as would be admitted to determine whether he is liable upon any other contract, as for necessaries (2). Without that instruction which is suited to his degree and station, the infant would be deprived of all means of improving his condition, or even of enjoying, advantageously for himself, those circumstances in which he is already placed. It seems clear, therefore, that such instruction is to be admitted into the rank of necessaries, according to the principles which prevail upon this subject; and that the infant would be liable on a contract for it, made either with the party by whom it was immediately furnished, or with one by whom it was provided for him (3). It has indeed been laid down by text writers, that an infant may bind himself by a contract to pay for instruction in a trade or business (4); but this doctrine has been objected to; and perhaps it is not to be considered as settled law (5). It is clear that no action is maintainable against an infant on the covenant to serve contained in an indenture of apprenticeship (6). This point was decided in *Croke Charles's Reports*, where it was laid down by the court, that neither at common law, nor by the statute 5 Eliz., is any covenant or obligation of an infant for his apprenticeship binding upon him. If he misbehave himself, said the court, the master may correct him in his service, or complain to a justice of the peace to have him punished according to the statute, but no remedy lies against an infant upon such covenant, and therefore it was adjudged for the defendant (7). By the custom of London, indeed, an infant may bind himself in an indenture of apprenticeship so as to be

Instruction.

(1) *Biddle and Loyd v. Levy*, 1 Stark. 20.

(2) See 1 Inst. 172 a. ante. Palmer's Rep. 528.

(3) Palmer's Rep. 528. 1 Keb. Rep. 466.

(4) 1 Wooddeson, 402. 1 Powell, 34, 5. 1 Com. on Contr. 155.

(5) See *Trueman v. Hurst*, 1 T. R. 40.

(6) *Gilbert v. Fletcher*, Cro. Car. 179. Co. Lit. 172 a. in marg. 1 Keb. Rep. 466.

(7) Cro. Car. 179. 19 vol. MSS. 110. Chitty, Apprenticeship, 66.

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subject to an action against him, even in the courts at Westminster (1), but not independently of special custom. Nor has a father, at the common law, any authority to bind his infant son apprentice without his consent; and therefore, where an indenture of apprenticeship was executed by the master and the father of an apprentice, but not by the apprentice himself, the court of king's bench determined that it was invalid, and that no settlement could be gained under it (2). But if an infant bind himself apprentice, and do not afterwards vacate the deed, it will be attended with the consequences of a binding indenture, so far as it is available for his benefit; and if he should duly serve under it, it will confer a settlement upon him: and though he be a pauper in the parish workhouse at the time of the binding, and the parish officers pay the premium, yet it is not necessary that they should sign the indenture, or that the justices should assent to it, if the apprentice be not a parish apprentice within the meaning of the statute 43 Eliz. c. 2. (3)

Trading contract.

A contract entered into by an infant, in the way of trade, is not binding upon him, although the trade in which he is engaged may be the means by which he gains his livelihood. The presumed indiscretion of an infant is considered, in point of law, as sufficient to incapacitate him from embarking in trade. And, therefore, in the case of an infant who kept a mercer's shop, it was held, that he was not liable to an action for the price of wares which he had purchased to sell again (4). So, where an action was brought for work and labour, to which the defendant pleaded infancy, and it appeared that the plaintiff had done the work as a writing-painter, in painting and gilding letters for the defendant, in the course of his business as a painter and glazier, Lord Kenyon determined that the action was not maintainable, on the ground that the law will not allow an infant to trade; and therefore no action can be maintained for a debt incurred in the course of such trading (5). So a bill of exchange, drawn by an infant in the course of trade, is clearly not

(1) Moore's Rep. 135. See John W. Eden's case, 2 Maule & Selw. 226. 229.

(2) The King v. The Inhabitants of Cromesby, 3 Barn. & Ald. Rep. 584.

(3) The King v. The Inhabitants of Arundel, 5 M. & S. 257.

(4) Whittingham v. Hill, Cro. Jac. 494. Wainsall v. Champion, 2 Stra. 1083. Lee, Ch. Jus. 2 Maule & Selw. 207—9. 6 Taunt. 120. 2 Esp. 480. 8 Taunt. 35.; but see Bull. Ni. Pri. 154.

(5) Dilk v. Keighley, 2 Esp. Rep. 480.

obligatory upon him (1). Where a plaintiff, an infant, entered into partnership with an adult, and the partners took a lease of premises from the defendant, for the purpose of carrying on their trade; the premium for which lease was paid, one half by the infant in cash, and the other half by bills drawn by the defendant, and accepted by the plaintiff, in the joint names of himself and partner; and the infant, the day after he became of age, dissolved the partnership; and four months after such dissolution, the defendant sued the adult partner alone on one of the bills, accepted a surrender of the lease from him, abandoned his action, and destroyed the other bills: it was held, in an action brought by the infant to recover back the money paid for the lease, that the facts ought to have been left to the jury, to determine whether he had not disaffirmed the contract within the knowledge of the defendant, and whether the latter had not shewn, by his own conduct, that the infant had not accepted the lease after he attained his full age. The court appears to have considered, that, independently of any admission on the part of the defendant, the infant ought to have been shewn to have given some notice or done some act of disaffirmance, in order to shew that he intended not to take to the lease, and to annul the contract (2). As an infant is incapacitated from trading, he is exempt from liability to be made a bankrupt; nor is a debt contracted during infancy sufficient to ground a commission against a trader, on an act of bankruptcy occurring afterwards (3). But, according to the general rule, although a trading contract is not enforceable against an infant, yet he himself may proceed upon it, if it contain any stipulation for his benefit; and therefore, where an action was brought upon an agreement, by which the defendant agreed to sell to the plaintiff (an infant) all the potatoes then growing upon three acres of land, at so much per acre, to be dug and carried away by the plaintiff, and the plaintiff paid £40 to the defendant under the agreement, and dug a part, and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue, he was held entitled to recover

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- (1) *Williams v. Harrison*, Carthw. 160. Holt, C. N. P. 359. 4 Ves. jun. 163. 6 ed. 601. 11 Ves. 402. 1 Ves. & B. 494. 6 Taunt. 119. 2 M. & S. 207. A bill accepted after the party is of age, though drawn before, is a sufficient debt. 4 Campb. 164.
- (2) *Holmes v. Blogg*, 8 Taunt. 35.
- (3) Bull. Ni. Pri. 38. Cases. K. B. 243. 1 Atk. 146. 197.

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for the breach of the agreement (1). An infant is, however, incapable of being petitioning creditor under a commission of bankruptcy (2). The defence, on the ground of infancy, must have respect to the time at which the contract is made. And, therefore, where goods were delivered by the vendor to a carrier, addressed to the purchaser, who was then a feme sole, and under the age of twenty-one, it was held that the infancy of the purchaser was a good defence to an action afterwards brought against her and her husband for the price of the goods, although they had not reached her till after she had attained her full age (3). By the delivery to the carrier, the property was vested in the plaintiff.

Cause of action
ex delicto.

Where the substantial cause of complaint against an infant is founded on a contract, upon which he is not liable, no action is maintainable, although by the forms which prevail in the law, the party with whom he has contracted may be at liberty to proceed as for a breach of contract, or in an action *ex delicto* as for a tort. The privilege of infancy will not indeed afford any answer to an action founded on a tort, as for slander, trespass, or assault, or trover for goods taken without contract (4). But where the cause of action is such as might be properly made the foundation of an action of assumpsit, the infant cannot be made liable by proceeding against him in a special action on the case. Therefore, where the plaintiff declared that he had delivered a mare to the defendant at his request to be moderately ridden, and that the defendant intending to injure the plaintiff wrongfully and injuriously rode the animal so that it was damaged, it was held, that the defendant might plead infancy in bar (5). On the same principle, an action is not maintainable against an infant for a fraud committed on an exchange of horses, in falsely warranting his horse to be sound when he knew it to be otherwise (6), nor is an action of assumpsit maintainable on a warranty of a horse (7), nor is any action maintainable against an infant for falsely representing a horse to be his property when it was not so (8), nor for representing himself to be of age, and

(1) Warwick v. Bruce, 2 M. & ad finem.
S. 205. 6 Taunt. 118. (5) 8 T. R. 335. 1 Keb. 778.
(2) Experte Barrow, 3 Ves. jun. 1 Leon. 169.
554. (6) Green v. Greenbank, 2
(3) Griffin v. Langfield, 3 Campb. Marsh Rep. 485.
254. (7) 4 Campb. 118.
(4) Jennings v. Randall, 8 T. R. (8) 1 Keb. 778. 1 Leon. 169.
336, 7. Com. Dig. Infant, D. 4.

by that pretence obtaining money (1), nor is an infant liable on the custom of the realm for the loss of goods committed to his care as an innkeeper (2). But, as before observed, an infant is liable where the cause of action is substantially for a tort; and therefore, it seems that he is liable in an action of assumpsit for money had and received, where having been entrusted to pay money on a certain account, he pretended that he had paid more than he really had, and embezzled great part of the money. (3)

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Wherever an act is of such a nature, that an infant might be compelled by law to do it, the execution of it will be binding on him although he should do it without suit (4). Therefore, where lands had been mortgaged to the infant's father, which he re-conveyed on the mortgage money being paid off, the conveyance was held valid. The case of *Zouch v. Parsons* appears to have been substantially to this effect: A person conveyed the lands in question to W. Cooke and his heirs by way of mortgage. Cooke afterwards died, leaving J. L. Cooke an infant his heir, the mortgage money was paid off, and the infant joined with his father's executor in conveying the mortgaged premises to a new mortgagee. It was resolved by the Court of King's Bench, that the infant was bound by this conveyance because it could never operate to his prejudice, and he was compellable to convey. (5)

Act which the
infant is bound
to do.

Where an action is brought on a simple contract, which is void on the ground of infancy, the defendant may avail himself of this answer, either under the general issue *non assumpsit*, or *nil debet*, or by stating the infancy specially (6). Payment of money into court will not preclude a defendant from availing himself of the privilege of infancy as to the residue of the demand (7). But where the plaintiff proceeds by bailable process, the court will not entertain a summary application to discharge the defendant on a common appearance on the ground of infancy (8). To the plea of infancy, the plaintiff, in order to support the action, must reply, either by denying that the defendant was an

How the infant's
contract is to be
avoided by plea.

(1) *Bac. Abr. Infancy*, I. 1 *Lev.* 169. 1 *Sid.* 258. But see *Peake's Rep.* 223. *infra*.

(2) *Roll. Abr. Action sur le Case*, D. 3.

(3) *Bristow v. Eastman*, *Peake's Rep.* 223. 1 *Esp. Rep.* 172.

(4) *Co. Lit.* 172 a. 3 *Burr* 180, 1.

(5) *Zouch v. Parsons*, 3 *Burr.* 1794.

(6) 1 *Bos. & Pul.* 481, n. a. 1 *Salk.* 279. *Cro. Eliz.* 126. 2 *Lev.* 144. *Bul. Ni. Pri.* 52.

(7) 2 *Esp. Rep.* 481.

(8) *Madox v. Eden*, 1 *Bos. & Pul.* 480.

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infant at the time of the contract, or by shewing that the demand is for necessities, or that the defendant ratified the contract after he became of age. If the plaintiff reply, that the defendant confirmed the promise after he had attained twenty-one, and the defendant rejoin that he did not, the plaintiff needs only prove a promise, and the defendant must shew that he was under age at the time. For where a person contracts, it is to be presumed that he is of the proper age, until the contrary be shewn, and the fact of infancy lies peculiarly within the knowledge of the defendant (1). A replication to a plea of infancy, that the defendant, since the making of the promises, attained twenty-one, and that before the exhibiting of the bill, he ratified and confirmed the promises, has been held good after verdict, although it omit to state expressly that he ratified and confirmed after he attained twenty-one (2). Lord Ellenborough C. J. observed, in this case, that the old and correct form of replication was, that the defendant made a new promise after he attained twenty-one; that a ratification must be done *animo ratificandi*; and that to call a promise by the name of a ratification, was to plead merely an artificial inference, instead of stating the very fact. Both modes of pleading have, however, been adopted in practice, and his lordship thought that this replication might be supported after verdict (3). Where the replication is, that the goods were necessities, care should be taken to state that they were necessities for the infant; for where, in *assumpsit* against an executor on a farrier's bill, the defendant pleaded that the testator was an infant, and the plaintiff replied that the demand was for looking after the infant's horses, the court held the replication bad, because it did not appear that the horses were necessary for the infant: it should have been general, that the articles were necessities for him (4). In an action on a bond or specialty, the defendant cannot take advantage of the privilege of infancy, under the general issue *non est factum*, but must plead the fact specially. This, indeed, has been said to be the meaning of the rule so frequently to be met with, that the deed of an infant, as contradistinguished from any other security, is voidable only, and not void, namely, that *non est factum* cannot be pleaded; for the instrument has the form, although not the operation of a deed; and therefore it cannot be avoided, without

(1) Borthwick v. Carruthers, & S. 724.

1 T. R. 648.

(3) Id. *ibid*.

(2) Cohen v. Armstrong, 1 M.

(4) 2 Stra. 1101.

stating the special matter (1). The reason why a deed enjoys higher privileges, in this respect, than a simple contract security, undoubtedly is, on account of its being an instrument of greater solemnity, and of its taking effect from its being sealed and delivered (2); but some confusion has arisen with respect to the distinction between void and voidable contracts. In Comyn's Digest, where the operation and effect of the several species of contracts are distinguished, it is laid down, that *every deed* by an infant is, generally speaking, *void* (3). In this class obligations are included; other acts are afterwards cited, which are only voidable, as a purchase of an estate, a conveyance by fine, a lease rendering rent, a statute or recognizance, a bailment of goods, or a sale of goods which are delivered with the infant's own hand (4); and in the enumeration of the modes by which an infant's act is to be avoided, it is laid down by the same authority, that an obligation or other deed shall be avoided by plea of *within age*, for it cannot be said *non est factum* (5). In commenting upon this authority, Lord Chief Justice Eyre observed, "Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule, that the infant cannot plead *non est factum*, but must plead his infancy; it is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." It may be observed, however, that the author of the Digest appears to have been of opinion, that in all cases where the privilege of infancy is to be set up in bar to an action on a deed, it must be taken advantage of by special plea, and that the plea of *non est factum* is not sufficient; that the form of the plea is not to be regarded as the criterion of a voidable, as distinguished from a void contract; that whether a contract be void or only voidable, the privilege of avoiding it or treating it as a nullity, like the power of confirming it or giving it effect, is confined to the infant himself, or in the case of an alienation of land, to a privy in blood as his heir, and does not extend to any third person; or even to a privy in estate, as one who becomes entitled by escheat. These distinctions appear to afford a just and satisfactory explanation of the law upon this subject, suffi-

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(1) *Thompson v. Leach*, 5 Mod. 310. Vide Cro. El. 127. See 3 Burr. 1805, 1808. where the general doctrine upon this subject is alluded to and discussed by Lord

Mansfield.

(2) 3 Burr. Rep. 1805.

(3) Com. Dig., Infant, C. 2.

(4) Com. Dig., Infant, C. 3.

(5) Com. Dig., Infant, C. 5.

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cient at least for all purposes of practical utility; although, as it has been remarked, it may, perhaps, in some instances, be difficult to decide whether an infant's act is void or only voidable, or rather to understand the application which has sometimes been made of those terms. Having briefly considered the mode in which an infant's contract may be avoided, where an action is brought upon it, which is all that seems to be material for our present purpose, we shall proceed to examine in what mode a contract, which in itself is not obligatory upon an infant, may be ratified or confirmed, and how far the privilege of infancy is of a personal nature, and therefore not available by any party except the infant.

Ratification of
infant's contract.

If a person, after he has attained his full age, promise to pay a demand upon him for goods supplied during his infancy, even although they were not necessities, this promise is binding (1). Although the law has with great providence secured infants from the oppression to which they might have been subject, if liable upon contracts entered into during their minority, yet there can be no reason why they should be exempted from responsibility, if they have deliberately confirmed their engagements in days of maturity and reflection. In the words of Mr. Justice Ashhurst, a security given by an infant, which is only voidable, may be revived by a promise after he comes of age. In such case he is bound in equity and conscience to discharge the debt, although the law will not compel him to do so; but he may waive the privilege of infancy, which the law gives him, to secure him against the impositions of designing persons. And if he choose to waive his privilege, the subsequent promise will operate upon the preceding consideration (2). Thus, a promise made by a party who has attained his full age to pay a bill of exchange is sufficient to render it operative, although the bill was given during his minority (3). So, the acceptance of a bill after the drawee has attained his full age is clearly binding, although the instrument was drawn upon him during his infancy (4). But, in order to revive a debt to which infancy would afford a good answer, an express promise must be proved,

(1) Southerton v. Whitlock, 1 Stra. 690. 1 T. R. 648. Zouch v. Parsons, 3 Burr. 1801.

(2) Cockshott v. Bennett, 2 T. R. 766.

(3) By Lord Ellenborough, Taylor v. Croker, 4 Esp. Rep. 187.

(4) Stevens v. Jackson, 4 Campb. 164.

for a mere acknowledgment, such, for instance, as would operate to revive a debt barred by the statute of limitations, is not sufficient to ratify an engagement made during infancy; nor will a promise to pay a part, or even an actual payment of part, amount to a confirmation on the part of the infant of the original contract (1). In chancery, however, it has been decreed, that if an infant borrow money and give a bond of it, and afterwards, being of sufficient capacity, devise his personal estate for payment of his debts (particularly those which he had set his hand to), the bond debt shall be paid, as this is presumed to have been the intention of the testator (2). To make the promise binding, it must be voluntary, and not extorted under terror of an arrest (3), or by fraud (4). A conditional promise is sufficient to revive the debt, as if it be to pay when able; but in that case, in order to sustain the action, some evidence of the debtor's ability should be given, which may be done by proving his ostensible circumstances, and the appearance which he makes in the world (5). Where a single bill has been given for necessaries, and after the debtor has come of age, he promises to pay the amount, there, as the obligation is valid, no action can be founded on the subsequent promise, but it must be brought on the deed, which is a higher security than a mere simple contract (6). Where a bond with a penalty has been given during infancy for the payment of a sum of money and interest, the instrument can only be ratified by an act of equal solemnity after the debtor has attained his full age, or by a re-sealing and re-delivery of it; and, therefore, where an action was brought on a bond, to which the defendant pleaded infancy, whereupon the plaintiff replied, that the defendant ratified and confirmed the bond after he attained his full age, the replication was held bad on demurrer (7). It appears, however, to have been decided, that where a party enters into a bond during infancy, and after he has attained his full age promises payment, an action is maintainable on this promise, on the ground (as was alleged), that the bond was not void but voidable (8), and the defendant could not plead *non est*

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(1) *Dilk v. Reighley*, 2 Esp. others v. Kertchen and others, Rep. 481. *Thupp v. Helder*, id. 2 Mad. Ch. Rep. 40.

628.

(2) *Nels. Chanc. Rep.* 55.

(5) *Cole v. Sanby*, 3 Esp. Rep. 159.

(3) *Harmer v. Killing*, 5 Esp. 102.

(6) *Bul. Ni. Pri.* 155. ante.

(4) *Brooke v. Galley*, 2 Atk. 34. in Equity; and see *Cory and*

(7) *Bayliss v. Dineley*, 3 M. & S. 477.

(8) *Vide ante.*

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factum, or *nil debet*; that if after he had arrived at full age he had accepted a defeazance of the bond, it would have been binding upon him, and that the debt was due in conscience (1). From the last words, however, an inference may be drawn, that in the case before the court it appeared that the bond was given for a valid consideration; that the promise was rather to be regarded as a confirmation of the debt for which the bond was given than of the bond itself; and that, at all events, the action should be founded on the new promise, and not on the bond. If a lessee of premises be an infant, he may affirm the lease by continuing in possession after he has attained his full age (2). And so also if an infant demise lands, reserving rent, the lease will be conclusively affirmed by acceptance of rent after the age of privilege has ceased (3). And it has been held, that if an infant be partner with another, and during his infancy represents himself as such partner, and upon his attaining twenty-one dissolves the partnership, he must give notice of such dissolution, or he will be responsible for the subsequent contracts of his copartner to persons ignorant of the dissolution. (3)

Effect of infancy
on third parties.

From the preceding observations, in which the modes of avoiding or of confirming an infant's contract have been pointed out, it is manifest, that the privilege of infancy is altogether personal, and that no third person who may happen to be interested can avail himself of it, to avoid a contract. (4) Where indeed a contract is made which is void on the ground of infancy, and the infant dies before he has confirmed it, no action can be maintained against his executor or personal representative; and if the executor should promise to pay the money, or give security in consideration of forbearance, the promise is void; for there is no benefit derived from it by him, nor any damage sustained by the party who claims as creditor (5). Nor can a husband and wife be sued on a contract made by the femme during infancy, and which is void on that account (6). A feoff-

(1) *Edmunds v. Burton*, Cro. El. 126, 7. 700. *Dyer*. 272 a. in marg. *Roll. Abr.* 18. l. 50. 4 *Leon*. 5. See that the bond with a penalty does not merge a pre-existing valid contract. *Bul. Ni. Pri.* 182. *Vide Noy's Rep.* 85. 3 *Burr.* 1805. 5 *Rep.* 119 a.

(2) 1 *Roll. Abr.* 731. l. 45. *Ketsey's case*, Cro. Jac. 320. 2

Bulstr. 69. S. C. 3 *Burr.* 1719. *Co. Lit.* 2 b. 8 *Taunt.* 37.

(3) *Good v. Harrison*, 2d Nov. M. 1821. K. B. and 5 B. & A. and 8 *Taunt.* 37.

(4) 2 *Hen. Bla.* 515.

(5) *Stone v. Wythipol*, Cro. El. 126.

(6) 3 *Campb.* 254. *Griffin v. Langfield*.

ment or alienation of land by deed may be avoided by one who is privy in blood to an infant as his heir, but not by one who is merely privy in estate, as a lord by escheat (1). Nor can the plea of infancy be taken advantage of by a stranger; for it would be incongruous to affirm that the election of avoiding or ratifying a contract resided in the infant, if the disability could be made available by a third person. And however incompatible it may appear with the rules which usually prevail in the law of contracts, that a contract made between two parties, as for instance, between a minor and an adult, should be voidable or void as to one, whilst it is absolutely binding on the other, yet this is a necessary consequence of the protection which the law has thrown around infants, and of the ideas of impotence which it attaches to their situation. Therefore, in all the cases in which the privilege of infancy can be set up, as in the instance of a trading contract (2); of a marriage contract (3); an agreement for supplying the infant with necessaries, and teaching him to sing and dance (4); whether there has been any part execution of the contract, or payment of money by the infant or not (5), although the infant is protected from liability, yet he himself is entitled to treat the contract as binding on the party with whom he may have contracted. For the same reason, when an infant slave in the West Indies executed an indenture by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part, after which the servant came to England with his master, in an action against A., a third party, who had seduced the man from B.'s service, A. was not permitted to allege that the contract was void, as being made by an infant and a slave, and therefore, that the declaration which stated him to have been retained as a servant for a term of years, was not proved; for the court held that the effect of such a contract might be the manumission of the slave, and consequently for his own benefit; and that at most it was only voidable by the infant himself (6). So where several parties join in a security, the infancy of one of them cannot be taken advantage of by any of the others; thus if

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(1) 8 Coke, 43.

(2) *Warwick v. Bruce*, 2 M. & S. 205. 6 Taunt. 118. S. C.

(3) *Holt v. Ward*, *Clarencieux*, 2 Strange, 938. 4 Taunt. 469.

(4) *Farmha v. Watkins*, 1 Sid. 446. 2 Keb. 623. S. C.; and see

Forester's case, Sid. 41. Keb. 1. S. C.; and see cases collected in *Bac. Abr., Infancy*, I. 4.

(5) 2 M. & S. 205. 209, 210.

(6) *Kane v. Roycott*, 2 Hen. Bla. 511. &

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an annuity be granted by two persons jointly and severally, one of whom is an infant, the covenant is not void as to both, but the other party may be sued alone (1). *And so where a negotiable security is given by two parties, and one of them is an infant, the other party should be proceeded against solely (2). For if a joint action should be brought, and one of the defendants should plead infancy, the plaintiff must discontinue and commence a fresh action; for he cannot enter a *nolle prosequi*, and proceed against the adult defendant solely. (3)

2. MARRIED WOMEN.

Another personal disability, the consideration of which is of equal importance with that arising from infancy—is occasioned by the coverture of a contracting party.* The incapacity in this case arises in a great measure from the want of free agency, as in the case of infancy it arises from a presumed want of judgment; it results from those ideas of union with the husband and identification with his interest which are attached to a married woman, or as she is called in law a *feme covert*, by reason of her having entered into the marriage state. To this purpose it is a common observation in our law books that the husband and wife are but one person in law; the meaning of which is, that the very being and existence of the wife, as an individual having separate interests, rights, duties, and liabilities belonging to her, are merged in or rather incorporated with her husband. Thus it is said that a married woman has no will but the will of her husband; for to one person it is essential that there should be but one will, and husband and wife are but one person. (4) Among the consequences of this doctrine are the rules that the husband and wife cannot be witnesses either for or against each other; that the husband cannot make a grant to his wife, or enter into a covenant with her; that the rights of property of the wife, whether derived by contract or otherwise, either before or after the coverture, fall in general under the dominion of the husband; that the wife is incapable of suing without her husband; that her liabilities are transferred to the husband; that her powers of binding herself by a contract are entirely annihilated by the marriage; that her power of binding her husband by a contract is confined to cases where he has given an express

(1) *Haw v. Ogle*, 4 Taunt. 10. 307. 5 Esp. Rep. 47. 14 East, 53 Geo. 3. c. 141. s. 8. *
(2) *Burgess v. Mevill*, 4 Taunt. (4) *Finch's Law*, 29. *Fonbl. Treat. Eq.* c. 2. s. 6. 1 vol. 90.
(3) 3 Esp. Rep. 76. 3 Taunt.

or implied assent; that she cannot be sued, any more than she can sue, without her husband. It is manifest, that all these legal consequences proceed from that idea of absolute identification with the husband, which the law attaches to the existence of a married woman; and that they are wisely intended for the preservation of the peace of society, and for the promotion of the comfort and happiness of the wife herself, as well as of the husband. In arranging the law upon this subject, it will be most convenient to consider, first, of the effect of marriage on pre-existing contracts, or, in other words, of the rights and liabilities of the husband with respect to contracts made with the wife before coverture. Secondly, of the wife's incapacity to contract, or to sue or be sued. Thirdly, of contracts made with the express or implied assent of the husband, distinguishing in what cases such assent is presumed in law, either for necessities or otherwise, and of the husband's liability to be sued on contracts so made. Lastly, of the modes in which the incapacity arising from coverture may be removed.

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In the first place then, all chattels personal, which the wife has in her own right, *in possession*, become the property of the husband immediately upon the marriage; he may dispose of them without the consent or concurrence of his wife; and at his death, whether he dies in her life-time or survives his wife, they belong to his personal representative (2). But *choses in action*, as debts due by bond or contract, do not vest in the husband by the mere operation of marriage; to entitle himself to them, he must first reduce them into possession, and if either party should die before they are so reduced into possession, they will not belong to the husband or his representatives, whether he should happen to survive his wife, or his wife should outlive him; but in the former case, her personal representatives will be entitled to them at her death, and the husband must proceed for them, if at all, as her administrator (3); and in the case of the husband dying before his wife, she will be absolutely entitled to them at his death (4). The husband, however, is entitled, if he think proper, to reduce the choses in action of the wife into possession during the cover-

Rights and liabilities of husband on contract before coverture, (1).

(1) See 1 Chitty on Plead. 18 on Pl. 22.
to 24. and 46 to 48.

(2) Co. Lit. 351. b. and note 1.
to p. 351. a. and 1 Chitty on Pl.
18. 46.

(3) Rep. T. Talb. 173. 1 Chitty
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(4) Co. Lit. 351. b. Com. Dig.
Baron and Feme, E 2, 3. F 2.
3 Mod. 166. Fitz. N. B. 121.
3 Peere Wms. 411, 2. Talb. Cas. 173.

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ture, and to proceed at law on any contract made with the wife *dum sola*. In an action on such a contract, the wife should in general be joined with the husband (1); but in some cases it is in the election of the husband either to proceed separately or to join his wife in the action (2). With respect to this point, it may be material to observe, that besides the two kinds of property just alluded to, namely, personal property in possession and choses in action, Lord Coke and other law-writers speak of a third class, namely, property of a mixed nature, being partly in possession and partly in action: as, for instance the arrears of a rent-charge accruing during the coverture, which he says are vested in the husband by virtue of the marriage, although he should not reduce them into possession, and if he should survive his wife, they will belong to him; and yet if she should survive her husband, they will belong to her (3). Negotiable securities given to the wife partake very strongly of the properties of this third description of chattels, for the right to them shifts with the possession, and though choses in action, they have some of the characteristics of chattels in possession. Where a bill of exchange is given to a feme sole, who afterwards marries, the right of indorsing it is vested in the husband (4); and in a late case, where a feme sole, to whom a bill was made payable, intermarried before it was due, it was holden that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill. (5)

As the husband is entitled to sue upon contracts in which the wife is beneficially interested, so he is *liable* to third persons, in respect of those debts and contracts by which his wife was bound at the time of her intermarriage (6). The action upon such a contract should be brought against the husband and wife jointly (7). And an action is not maintainable against the husband alone, in *assumpsit* for use and occupation in respect of enjoyment of a house by his wife *dum sola* (8); nor is a husband chargeable after the death of his wife for a debt due from her before

(1) Ramsay v. George, 1 M. & S. 176. 3 T. R. 631. Com. Dig. Baron and Feme, V.

(2) Com. Dig. Baron & Feme, X.

(3) Co. Lit. 351. b.

(4) Barlow v. Bishop, 1 East, 432. 3 Esp. Rep. 266. S. C.

(5) Macneilaye v. Holloway, 1 Barn. & Ald. 218.

(6) Com. Dig. Baron and Feme, N. 1 Rol. Abr. 351. l. 25. 3 Mod. 186. 1 Chitty on Pl. 46.

(7) Mitchinson v. Hewson, 7 T. R. 348. 1 Camp. 189. Bac. Abr. Baron and Feme, Com. Dig. Baron and Feme, 2 X. 2 Y.

(8) Richardson v. Hall, 1 Brod. & Bing. 50.—1 Chitty, on Pl. 46.

coverture, for the demand in this case is only a chose in action (1). But if the wife should survive her husband, a debt due from her, before her coverture, survives against her, and may be recovered accordingly in an action. (2)

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But the most important consideration arising from coverture, in the law of contracts, is the wife's incapacity to contract. It is a general rule at law, that every agreement, whether by simple contract or specialty, made by a married woman without her husband, is, in the absence of any express or implied assent on his part, absolutely void (3), except indeed in the instance of the queen consort (4), or of a deed inrolled, or covenant on the warranty in a fine, or on a covenant running with the land of the wife demised by her during the coverture (5), and certain other contracts, which may be binding on a feme covert by special custom (6); and this rule prevails so strongly, that a feme may avail herself of her coverture to defeat a contract, though she have been guilty of fraud (7); nor can a married woman even state an account of a debt contracted before marriage (8). The doctrine results from the general reasoning which has been already adverted to. To say that a married woman could charge *herself* by her contract, would be to presuppose that she had property in respect of which she would be liable to answer; whereas, by the general contemplation of law, her property became vested in her husband by the act of marriage; to say that she could charge her husband by such a contract, would be to affirm, in opposition to all justice, that his property might be bound by an act done without his consent. It would also be inconsistent with that absolute union of interest, which we have before shewn to exist in the case of husband and wife, that the wife should be capable of binding her husband by a contract, in respect of any separate benefit which might accrue from it to herself. For these reasons, the contract of a married woman is altogether void; it will neither charge herself nor her executor; nor does it work any change

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void.

(1) 1 Rol. Abr. 351. l. 40. 7 217. 1 Chitty on Pl. 46.
T. R. 350. (4) See Co. Lit. 133. a.
(2) Woodman v. Chapman, 1 (5) 2 Sand. 180. n. 9.
Campb. 189. 1 Chitty on Pl. 47. (6) Hob. 225. 34 & 35 Hen. 8.
(3) Manby v. Scott, 1 Sid. 120. c. 22. See infra.
1 Lev. 4. 1 Mod. 128. S. C. 2 Atk. (7) 4 Campb. 26.
453. 2 Wils. 3. 8 T. R. 545. (8) 2 Esp. Rep. 716. 1 Taunt.
2 B. & P. 105. Palm. 312. 1 Taunt. 212.

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of property. No action can be maintained against the executor of a woman, for goods sold, where she appears to have been married at the time of the contract; and a replication, that the woman lived apart from the husband, and carried on a separate trade; that the credit was given to her, and the promises made by her; and that after her death, the defendant, as her executor, possessed himself of her effects to a greater amount than sufficient to satisfy the plaintiff's demand, was holden bad on demurrer, and judgment was given for the defendant (1). For from this case it appeared, that the testatrix, as being a married woman, could not acquire any property; that the probate of her will was invalid; that no action could have been brought against her in her lifetime. For the same reason, a tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman is incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution, at the suit of the husband's creditor, an action of trover is maintainable by the tradesman (2). If the wife sell or dispose of the money or goods of the husband, without his assent, the sale is void, and the husband may have trover for the goods, and if she lose money at cards, the husband may bring an action for the money (3). As a consequence of the same doctrine, a married woman is in general incapable of being made a bankrupt (4). It is also now clear, although a contrary opinion at one time prevailed, that a feme covert cannot at law contract and be sued as a feme sole, even although she is living apart from her husband, and has a separate maintenance secured to her by deed (5). And where, to a plea of coverture, the plaintiff replied, that the defendant was separated from her husband; that alimony was allowed her by the ecclesiastical court, pending a suit there, which was a sufficient maintenance; and that she obtained credit and made the promises on her own account, as a feme sole, and not on the credit of her husband, the replication was

(1) Clayton v. Adams, 6 T. R. 604. See also 2 Atk. 453. Boggett v. Frier, 11 East, 301, 3. infra.

(2) Smith v. Plover, 15 East, 607. See also 2 Atk. 453.

(3) Com. Dig. Baron and Feme, (Q.)

(4) Mont. on Bank. Law, 4.

(5) Marshall v. Rutton, 8 T. R. 545. which reversed Corbett v. Poelnitz, 1 T. R. 5. and cases there cited. And see 2 Bos. & Pul. 105, 6, 7. 3 Campb. 124, 5. 1 Esp. 4, 7. 5 T. R. 679—682.

holden bad on demurrer (1). In the city of London, indeed, in which there are many peculiar privileges and customs, confirmed to the city by act of parliament, there is a custom, for the benefit of trade, that a feme covert trading within the city, without any interference in her business on the part of her husband, shall be regarded to some purposes as a single woman; that is, that she may sue and be sued as a feme sole; and that although, even in the city courts, the husband must be joined for conformity, yet the feme shall be considered as substantially the party to the suit, and execution shall go against her (2). This custom, however, is what is termed an executory one, available only in respect of transactions in the city of London, and united to the courts of that city; and therefore a feme covert, a sole trader within the city, cannot sue or be sued, in the courts at Westminster, without her husband (3). Nor will the death of her husband before the action brought, entitle her to sue, in respect of such proceeding, as on goods sold by her in her own right. (4) Nor does it appear that by this custom a feme covert, sole trader, can execute a bond, but only make herself liable to simple contract debts; if she could give a bond, said Lord Mansfield, she might bind her heirs, having real assets, which no custom, he observed, could warrant (5). A person so trading within the city, is, however, liable to be made a bankrupt although a married woman (6).

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It should be observed, that although the contract of a married woman is in general void, except in the city of London under the custom just mentioned, yet where money has been lent or some other consideration has passed to a married woman, from which she has derived benefit, she is under a moral obligation to repay the money, or perform her part of the engagement, and if, after her coverture has ceased, she should promise to perform it, this promise is binding. For there can be no doubt, in the present day, that a moral obligation is sufficient to support an express promise. And therefore where a feme covert, having an estate settled to her separate use, gave a bond for repayment, by her ex-

(1) *Ellagh v. Leigh*, 5 T. R. 679. Vide *Chambers v. Donaldson*, 9 East, 471. *Innell v. Newman*, 4 Barn. & Ald. 419. as to actions by a feme covert, in the name of her husband.

(2) *Laughan v. Bewett*, Cro. Car. 67. 10 Mod. 6. 2 Bos. & Pul. 93. 101. *Selwy. Ni. Pri.* 267.

(3) *Caudell v. Shaw*, 4 Term. Rep. 361. *Beard v. Webb*. 2 Bos. & Pul. 93.

(4) 4 T. R. 361.

(5) *Read v. Jewson*, 4 T. R. 363.

(6) *Ex parte Carington*, 1 Atk. 206. 3 Burr. 1783. 1 Mont. B. L. 4.

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ecutors, of money advanced at her request to her son-in-law on the security of that bond, and, after her husband's decease, she wrote, promising that her executors should settle the bond, it was held that assumpsit was maintainable against her executors on this promise (1). Where indeed it was stated, in an action before Ch. J. Pratt, that a married woman had given a note as a feme sole, and after her husband's decease promised payment in consideration of forbearance, the learned judge appears to have decided that the action was not maintainable; but the ground of this decision probably was, that the new promise was incorrectly stated to have been made in consideration of forbearance of a prior debt, whereas in point of law there could have been no forbearance, as the contract made during coverture was void, and no legal debt or liability existed in respect of it (2). The rule with regard to the confirmation of a deed made during coverture, is laid down in Perkins, where, after saying that there cannot be two deliveries of the same deed, he adds, if a married woman deliver a bond unto me or other writing as her deed, this delivery is merely void; and therefore if after the death of her husband, she being sole, deliver the same deed unto me again as her deed, this delivery is good and effectual (3). A re-delivery by the feme after the death of the baron, of a deed delivered by her whilst covert, is a sufficient confirmation of the deed to bind her without its being re-executed or re-attested. And circumstances alone may be equivalent to such re-delivery, although the deed was made jointly by the baron and feme, and no fine levied. (4)

Modes of taking
advantage of
coverture.

The defence of coverture, existing at the time of commencing the action, may be available either by a plea in bar or in abatement, by a writ of error, or a motion to the court. Where a party is sued in assumpsit as a feme sole, who was married at the time when the contract was made, she may avail herself of her privilege, under the plea of non-assumpsit (5). And the same plea will be available where a defendant, who is sued as a married woman, was at the time of making the contract married to another man her first husband, who is still alive (6). But where the

(1) *Lee v. Muggeridge*, 5 Taunt. 201. Vide, *tamén* 2 P. 36. and *Smith v. French*, 2 Atk. 245. Wms. 127.

(5) 12 Mod. 101.

(2) *Loyd v. Lee*, 1 Str. 94.

(3) *Perkins*, s. 154.

(6) *Cowley v. Robertson and Wife*, 3 Campb. 438.

(4) *Goodright v. Stephen*

coverture has arisen subsequently to the making of the contract, and the wife is sued alone, this fact could only be pleaded in abatement, and not in bar of the action, because, in the first case, the defence proceeds on the defect in the contract, and is a total bar; whereas, in the latter, it only proceeds on the ground that the husband ought to have been joined (1). Where the action is brought on a deed which is void, on the ground that the party who executed it was a married woman, the defence is available under the plea of *non est factum* (2). In support of the plea of coverture, it will not be sufficient to prove that the defendant was formerly married, and that the husband went abroad at the distance of twelve years before the commencement of the action; for after an absence of seven years from the country unheard of, he would be presumed to be dead (3). Where a married woman is sued without her husband by bailable process, the court will entertain a summary application, on an affidavit of the marriage and of the husband's being alive, to discharge her out of custody, or order the bail-bond to be delivered up to be cancelled, even although at the time of making the contract she was living apart from her husband, with a separate maintenance (4), and with costs to be paid by the plaintiff, if he were aware of her privilege (5). It seems, however, that the affidavit of the coverture must be made by the feme covert herself, and not by a third party (6). And where a married woman has given a bill of exchange in her own name (7), or otherwise imposed upon the plaintiff by procuring credit to be given to herself (8); or where the fact of coverture is doubtful (9), the court will not discharge her on motion, but leave her to plead the coverture, or bring a writ of error, if she think proper.

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But although the wife's capacity to contract is put an end to by the marriage, and her property falls in general under the dis-

Contract of wife
when enforced
in equity.

(1) 3 T. R. 631.

(2) *Lambert v. Atkins*, 2 Campb. 272. 3 Burr. 1805. 12 Mod. 609

(3) *Hopewell v. De Binna*, 2 Campb. 113. *Id.* 273. 3 Campb. 439. 6 East, 85.

(4) *Wardell v. Gooch*, 7 East, 582. *Wilson v. Serres*, 3 Taunt. 307. *Pritchett v. Cross*, 2 Hen. Bla. 7. *Tidd*, 201, 2. as to mode of proceeding where baron and

feme are sued jointly.

(5) 3 Taunt. 307.

(6) *Jones v. Lewes*, 7 Taunt. 55. 2 Marsh, 385. S. C.

(7) 7 Taunt. 55.

(8) *Waters v. Smith*, 6 T. R.

452. *Wilson v. Campbell*, *Tidd*,

202. 2 Bla. Rep. 903. 3 Bos. &

Pul. 220. 5 T. R. 194. 1 East,

16. 2 New Rep. 380.

(9) *Id.* *ibid.*

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possession of her husband; yet it frequently happens that, either by a settlement made with trustees with the consent of the husband before marriage, or from some other source, the wife is entitled to separate property, over which, in a *court of equity*, the husband has no controul. Her having such separate property does not indeed remove her incapacity to contract, but she has a power of charging or disposing of it, subject of course to the conditions and limitations with which the property was clothed on her becoming entitled; and it has been decided in the court of chancery, that a general personal engagement of the wife, as for instance, a bond given by a feme covert as surety (1), or a bond or promissory note given as a security for money borrowed by her (2), or given jointly with the husband as a security for his debt (3), although the instrument is void as a contract, both in law and equity, and although it contains no reference to her separate estate, will be regarded as evidence of an intention on her part to charge her own separate property, and will accordingly operate as a lien upon it, in respect of which she is liable to be proceeded against in that court; and where her discretion is freely exercised, the contract will be obligatory (4). It is evident that such a separate state of property in the wife will frequently preclude the husband, both at law and in equity, from the exercise of those marital rights which he would otherwise be entitled to (5). Property so vested in trustees, by a marriage settlement or otherwise, for the separate use of the wife, is not liable to be taken in execution for the husband's debts. Thus it has been determined that a woman may before marriage, with the consent of her intended husband, convey all her stock in trade and furniture to trustees to enable her to carry on her business separately, and if the husband do not intermeddle with them, and there be no fraud, such effects, although fluctuating, are not liable to his debts (6). And a settlement made after marriage is valid, if founded on articles made before, or if supported by a good and

(1) *Heatly v. Thomas*, 15 Ves. 2 Atk. 68. 11 Ves. 209. 1 Ves. 596. and Beame, 121, 2, 3.

(2) *Bulpin v. Clarke*, 17 Ves. 365. *Norton v. Turvill*, 2 P. Wms. jun. 116. (4) *Dalbiac v. Dalbiac*, 16 Ves.

144. (5) *Chambers v. Donaldson*, 9 East. 4 Barn. & Ald. 419.

(3) *Hulme v. Tenant*, 1 Bro. Ch. C. 16. observed upon 9 Ves. 188. 486. 2 Ves. jun. 138. *Norton v. Turvill*, 2 Peere Wms. 144. (6) *Jarmān v. Wollotton*, 3 T. R. 618. See also *Cowp.* 437. 8 East, 477. 6 id. 527.

valuable consideration (1). But when the settlement is voluntary or fraudulent (2), and in some cases where the husband is allowed to remain in possession of the settled property (3), the property is liable to be taken in execution at the suit of a creditor of the husband. And there can be no doubt that a term vested in the wife before marriage, and which the husband is entitled to in her right, may be taken in execution for the husband's debt. (4)

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Although a married woman is thus in general incapable of making a valid contract without her husband, yet it is clear that she may bind her husband by a contract made with his express or implied assent. It is indeed just as expedient and necessary both for herself and her husband, that the wife should have capacity to act on certain occasions as agent for her husband, as it is incompatible with the rights and duties of the marriage state, that she should have the power of contracting separately from him whenever she may think proper. Where, therefore, an express assent has been given by the husband to the act of a *feme covert*, he will be bound accordingly; and in many cases, the husband's assent may be presumed to support contracts apparently entered into with the wife. From such acts by the wife, no prejudice can in general arise to the husband; but on the contrary great detriment and inconvenience might ensue both to himself and to others, if his co-operation were essential to their validity. To decide whether such assent can be presumed or not, it is necessary to advert to the circumstances under which the parties are living. *First, where the husband and wife are living together*, and goods are ordered by the wife, which are suitable to the husband's degree and station, are supplied to his house, and consumed in his family; these circumstances undoubtedly afford a presumption that the wife had authority from the husband to make the contract; and in the absence of any contradictory circumstances, he would be liable to be sued upon it (5). It may be taken as a general rule, that where a husband and wife are living together, the former will be answerable for necessities furnished to her, to any extent which may be conformable to that station of life that he allows her to assume (6). So, where the husband's children

Contract with
husband's ex-
press or implied
assent, where
living with or
apart from the
husband.

(1) *Hume v. Wilsmore*, 8 Term Rep. 521.

(2) *Id. ibid.*

(3) 3 T. R. 618. See also 8 T. R. 82. 2 Stark, 274.

(4) 4 T. R. 638. 9.

(5) Per Holt. C. J. *Etherington v. Perrott*, 2 Ld. Raym. 1006. 1 Salk. 118.

(6) *Waithman v. Wakefield*, 1 Campb. 121.

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are living with the wife by the husband's permission, the wife has an implied authority to purchase necessities for them (1). And where a man marries a widow, and receives her children into his family, although he was not bound by the act of marriage to maintain the children, yet having treated them as part of his family, he is liable for contracts made by the wife in his absence for the education of the children (2). So where a feme covert, without authority to bind her husband by an instrument under seal, contracts with a servant by deed, the servant, after performing the stipulated service, may maintain an action of assumpsit against the husband (3). To authorize the wife to execute a deed for her husband, there should be very express evidence of his assent (4), and it should be given in the husband's name (5); but though the deed is void, he may be liable in another from where his implied assent can be proved to the service performed (6). Nor is the liability for necessities confined to cases where they are supplied to or for the use of the lawful wife of the party to be charged. Where a man cohabits with a woman to whom he is not married, and allows her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessities, he will become liable, although the creditor may be acquainted with her real situation (7). Nor will it be any answer to an action against a defendant, who has allowed a woman to appear to the world as his wife, and to contract debts as such, either in the management of his household affairs or otherwise, that he is already married to another person (8). The question, in a case like this, is not affected by the legality of the marriage; it is, whether credit was or was not given to the defendant for the articles supplied. Even in a case where the husband, by the operation of law, may be entitled to consider himself discharged from the burthen of maintaining his wife, he may be responsible, if he has not taken due precaution to prevent her from gaining credit in his name; and therefore where, after the commission of adultery by the wife, the husband left her in his house with two children bearing his name, but without making any provision for her

(1) *Rawlins v. Vandyke*, 3 Esp. 250.

(2) *Stone v. Carr*, 3 Esp. 1.

(3) *White v. Cuyler*, 1 Esp. 200. 6 T. R. 176.

(4) *Vide* as to this, 2 Freem. 218. *Bing. on Inf.* 207. N. B.

(5) 6 T. R. 176.

(6) *Id. ibid.*

(7) *Watson v. Threlheld*, 2 Esp. Rep. 637. *Minno v. D. Chenimant*, 4 Campb. 215.

(8) *Robinson v. Mahon*, Campb. 249.

in consequence of the separation, and she continued in a state of adultery, it was held, that the husband was liable for necessaries furnished to her, unless the plaintiff knew or might have known the circumstances under which she was living (1). It is in all cases proper to keep in view, that the ground upon which a husband is liable for debts contracted by his wife is, because she is supposed in contracting them to act as his servant or agent (2). In a special verdict, the fact of assent should be found by the jury, and not merely the evidence of the fact (3). In order to rebut the presumption that an authority was given on the part of the husband, it may be proved, in an action brought against him for the price of goods supplied, as for instance, for the price of dresses furnished by the wife's order and for her use, that she was not in want of articles of this kind, and that the husband had given notice to the tradesman not to trust her (4). Money lent to a married woman cannot be recovered against the husband; for by such a loan, the money would be left at the wife's disposal, and she might afterwards lay it out in any manner that she thought proper (5). The husband therefore is not liable at law, although the money may have been expended in the purchase of necessaries; but in a court of equity the lender of the money would be entitled to stand in the place of the tradesmen by whom the goods were supplied (6). Where a married woman buys materials for clothing, and pawns them before they are made up, the husband is not liable, for they never came to his use; it is otherwise, where the clothes are made up and used by the wife, although they may be afterwards pawned by her (7). And, where a party has contracted with the wife herself as having a separate character, he is not entitled to charge the husband; for although the contract with the wife may be void, yet the creditor is not on that account entitled to proceed, in opposition to the truth of the case, against the husband, and to recover against him as upon a contract which in point of fact was never entered into. It is a question of fact, whether a tradesman who furnishes goods for the wife, gives credit to her or her husband; if the credit is given to her, the husband is not liable,

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- (1) Norton v. Fazan, 1 Bos. & Pul. 226. Govier v. Hancock, 6 T. R. 603. (5) Earl v. Peale, 1 Salk. 387. Harris v. Lee, 1 P. Wms. 482.
(2) 4 Barn. & Ald. 255. per Prec. Ch. 502.
Best, J. (6) Id. ibid.
(3) Manby v. Scott, 1 Mod. (7) 1 Salk. 118. Per the Ch. J.
(4) Per Holt, C. J. Etherington Com. Dig. Baron and Feme, v. Parrott, 2 Ld. Raym. 1006. (Q).

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although the wife lives with him, and he sees her in possession of some of the goods (1). So if wearing apparel be supplied to a married woman in quantities unsuitable to her husband's degree, and without his knowledge, for which the credit is given to her, and her promissory note is taken in payment, the husband is not liable for any part of the goods; and in an action against him for their value, he is not bound to prove that his wife was supplied with suitable wearing apparel from any other quarter (2). It is also clear that the wife cannot bind her husband by acting as his agent beyond the scope of her general authority. Where the husband had taken a bond conditioned for the payment of an annuity to his wife, it was held that the latter could not without the assent of the husband agree with the obligor to discharge him from future payment of the annuity, in consideration of his discharging certain debts of the husband; but the husband may notwithstanding sue for the arrear of the annuity when due (3). As a consequence of the wife's agency for the husband, her representations or admissions, made within the general scope of her authority, are admissible in evidence against the husband. Thus, in an action against the husband for board and lodging, where it appeared that the bargain for the apartments had been made by the wife, and that, on a demand being made for the rent, she acknowledged the debt, the plaintiff was held entitled to recover (4). And so where a wife is accustomed to conduct business for the husband, her admission of a debt is available to take the case out of the statute of limitations (5). So where an action was brought by the orders of a wife, in the name of her husband, to recover a sum of money taken from her, on the ground that it was the produce of goods which she had been concerned in stealing, what she afterwards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is evidence for the defendant; and in such an action, facts being proved to raise a reasonable suspicion that the money taken from the wife was the produce of stolen property, evidence must be

(1) *Bentley v. Griffin*, 5 Taunt. 356.

(2) *Metcalfe v. Shaw*, 3 Campb. 22. 4 Camp. 70. See also *Mainwaring v. Sands*, 2 Stra. 706. *Holt v. Biren*, 4 Barn. & Ald. 255.

(3) *Brown v. Benson*, 3 East, 331.

(4) *Emerson v. Plowden*, 1 Esp. Rep. 142.

(5) *Anderson v. Saunderson*, 2 Stark, 204. *Holt C.N.P.* 591. *Gregory v. Parker*, 1 Campb. 394. See *Carey v. Adkins*, 4 Campb. 92, 3.

produced on the part of the plaintiff, to show whence the money was derived, and that the wife was *bonâ fide* in possession of it for her husband (1). And, in an action of assumpsit by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife of the defendant at the time of the hiring, which, though void as a deed, was admitted in order to show the terms of the contract. (2)

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Secondly, where the husband and wife have ceased to live together, the former will be liable upon a contract made with her, where his assent can be implied. By the ecclesiastical law, where a husband, separated from his wife, refuses to make her a sufficient allowance, she may institute a suit against him for alimony, but the wife's remedy for this allowance lies peculiarly in the spiritual, rather than in any temporal court. Still however where, through the husband's misconduct, the wife remains unprovided for, the husband may become liable at law to a party supplying her with necessaries; and even in a case where the circumstances exclude any presumption of an actual assent on his part, a contract may arise, upon which he will be liable to an action on the ground of the relation in which he stands towards his wife, and the duty which he owes to her. Thus, where a husband, without any sufficient cause, turns his wife out of doors (3), or refuses to admit her into his house (4), or by his cruelty and ill-treatment (5), or his indecency of demeanour (6), renders it improper that she should remain with him; in any such case it is held that the husband sends credit with his wife for her reasonable expences, and is liable to be sued for necessaries furnished to her, although he has given a general notice to all persons, or even a particular one to the individual supplying the articles, not to give credit to the wife (7). It has even been ruled at Nisi Prius that if a husband turns his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose.

(1) Carey v. Adkins, 4 Campb. 94. Hodges v. Hodges, 1 Esp. Rep. 441. Harwood v. Heffer, 3 Taunt.

(2) White v. Cuyler, 6 T. R. 176. 421. Fonbl. Eq. 5 ed. 101.

(3) Ld. Raym, 444. Harris v. Morris, 4 Esp. Rep. 42. (6) Aldis v. Chapman, Selw. Ni. Pri. 263. Liddlow v. Riland, 2 Stark. 87. Vide tamen 3 Taunt.

(4) Rawlins v. Vandyke, 3 Esp. 251, 2. (7) Boulton v. Prentice, Sel. Ni. Pri. 263, 4. Harris v. Morris, 4

Ni. Pri. 263. 2 Stra. 1214. Esp. 42.

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Lord Ellenborough, C. J., by whom the case was decided, observed, that the defendant's liability for this charge must depend upon the necessity for exhibiting articles of the peace against him. If that proceeding was uncalled for, his wife certainly could not make him liable for the expence thereby incurred. But if she was turned out of doors, in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, his lordship added, charge her husband for the expence of this proceeding, as much as for necessary food or raiment (1). But the husband is not liable for money lent to his wife, although laid out in the purchase of necessaries; the only remedy which the creditor could adopt in this case would be to resort to a court of equity; in which court he would be entitled to stand in the place of the tradesman supplying the necessaries (2). It has been considered, however, that no ill-treatment short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain assumpsit against the husband for necessaries furnished to his wife subsequently to her leaving his house; and that the husband's having introduced another woman into his house, is not sufficient, where the wife might have had necessaries if she thought fit to have remained there, to charge him in an action for goods supplied to her from another quarter: but the proper course for the wife to pursue is to sue for alimony, and a divorce *a mensa et thoro* (3). Where the wife voluntary leaves her husband without his consent, and he gives notice to a certain tradesman not to trust her, he is not liable to an action for goods supplied by the tradesman (4); but it seems that in such case a general notice to all persons not to trust the wife would be void (5). Where the wife has a separate maintenance from the husband, although it be not secured to her by deed or writing (6), and the allowance is suited to the husband's station (7), and is actually paid (8), and the creditor has notice of

(1) *Shepherd v. Mackoul*, 3 Campb. 326. Vide *Fonbl. Treat. Eq.* 93. n. 1. as to question in ecclesiastical court, where wife sues her husband.

(2) *Earle v. Peale*, 1 Salk. 387. *Harris v. Lee*, 1 P. Wms. 482. *Prec. Chanc.* 502.

(3) *Harwood v. Heffer*, 3 Taunt. 421. *sed quære*. And see *Aldis v. Chapman*, ubi supra. 2 Stark, 87. 1 *Fonbl. Eq.* 5 ed. 100. note 1.

(4) 1 Sid. 109. 1 Lev. 4.

(5) 1 Sid. 127.

(6) *Hodgkinson v. Fletcher*, 4 Campb. 70. *Holt v. Brien*, 4 Barn. & Ald. 254, 5.

(7) 4 Campb. 71. 4 Barn. & Ald. 254.

(8) *Nurse v. Craig*, 2 New Rep. 148. 4 B. & A. 254. The wife's receipt is not sufficient evidence of payment. 4 Campb. 70.

this, or has the means of ascertaining it from its being notorious in the neighbourhood (1), the husband is not liable for necessities furnished to his wife. And where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessities during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable for the price; if therefore, in a case like this, where he is not liable by law, he should promise conditionally to pay the money, no action can be maintained against him unless the condition which was annexed to the promise has been complied with (2). When the wife lives separately from her husband, without any fault of her own, the law provides, that her husband shall be liable for her adequate maintenance, but if she is supplied with an adequate proportion of the family means, he is no longer responsible (3). Where a husband goes abroad and leaves his wife, who dies in his absence, and the wife's father pays the expences of her funeral in a manner suitable to the husband's rank and fortune, the amount may be recovered back from the husband, although expended without his knowledge or consent (4). It seems, however, that a third person who pays debts contracted by the wife under such circumstances will not acquire any claim against the husband. (5)

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Thirdly, where the wife has been guilty of the crime of adultery, either during cohabitation with her husband or in a state of separation from him, her claims for maintenance and protection are forfeited by her misconduct. Thus where the wife committed adultery under the husband's roof, and he turned her out of doors, it was held that he was not liable for necessities furnished to her after the expulsion (6). Where the wife eloped with an adulterer, it was held that the husband should not be charged for necessities, although the tradesman who supplied them had no notice of her criminality (7). And even where the husband had been guilty of adultery with a woman whom he brought home, and had turned his wife out of doors, without any imputation on her conduct, and the wife during her absence committed adul-

(1) Todd v. Stokes, Salk. 116. Bla. 92.

Ld. Raym. 444.

(5) Id. ibid.

(2) Holt v. Brien, 4 Barn. & Ald. 252.

(6) Ham v. Torrey, Sel. Ni. Pri. 260.

(3) 2 Stark. 88, 9.

(7) Stra. Rep. 647. 706. Morris

(4) Jenkins v. Tucker, 1 Hen. v. Martin Mainwaring v. Sands.

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women.

tery, but afterwards offered to return to her husband, who refused to receive her, it was held that the husband was not bound to receive his wife, nor liable for necessities furnished to her after she had committed this offence (1). But although a husband may be entitled to consider himself discharged from responsibility for the maintenance of his wife, yet he may still be liable where he has not taken due measures to prevent her from gaining credit in his name; and therefore where the wife, having committed adultery, the husband left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation, it was held, that although she continued in a state of adultery, the husband was liable for necessities furnished to her, on the ground that it did not appear that the tradesman knew, or ought to have known, the circumstances under which she was living (2). And if after the wife's criminality, the husband again receives her into his house, his liability for necessities revives; and if he should afterwards expel her from his house, he will be liable, although he has given a general notice, or even a particular one to certain individuals, not to give her credit. (3)

How incapacity
of coverture re-
moved.

Lastly, let us examine by what modes the incapacity arising from coverture may be removed. This may be not only by the death of one of the parties, but also by a divorce *a vinculo matrimonii*, by which the bond of marriage is dissolved, and the parties are free to contract again in wedlock, and to do all other acts as if they had never been married (4). So, it is clear that after a sentence of nullity of marriage, the reputed wife is capable of binding herself by her contract, and is liable to be sued upon it; and she is even liable for goods supplied on her credit before the sentence was pronounced (5). After a sentence of divorce *ab initio*, the liability of the husband for the debts of his wife does not continue. She becomes a single woman by operation of law; and her liabilities are the same as if she had always remained

(1) *Govier v. Hancock*, 6 T. R. 603.

(2) *Norton v. Fazan*, 1 Bos. & Pul. 226.

(3) 11 Ves. j. 536. *Harris v. Morris*, 4 Esp. 41, 2. 1 Salk. 19. 6 Mod. 172.

(4) Com. Dig. Baron and Feme, C 1. & C 7. Moore's Rep. 666. Ca. 910. 1 Salk. 115, 6. Cro. El. 908. 3 Mod. 71. Cro. Car. 463. 1 Bla. Com. 440. 441.

(5) *Anstey v. Manners*, 1 Gow's Rep. 10.

single (1). So also, thirdly, in the case of the abjuration of the husband, which means a transportation for ever into a foreign land, and is sometimes said to amount to a divorce between him and the wife (2), or of his perpetual banishment by sentence of law (3),—the wife has capacity to contract and to sue or be sued as a feme sole, the husband being in such case *civiliter mortuus*. And although Lord Coke lays down that if the husband by act of parliament be adjudged to be banished for a time only, which he says some call a relegation, this is no civil death (4); yet it has been observed that during the limited period, the effect of his absence is the same to the wife as if it had been perpetual, and it is equally necessary that she should have a right to sue alone (5). And it has been decided that a woman, whose husband has been transported, may, after the expiration of the term of transportation, sue upon a cause of action which accrued during that period, unless it can be shewn that the husband has returned (6). Where the husband is an alien enemy, and out of the realm, it seems that the wife may be sued alone (7); or where the husband is an alien, and has never been in this country (8). But a woman by birth an alien, and the wife of an alien, is not liable to be sued as a feme sole, if her husband has lived with her in this country, although some years before the contract was made he left his wife, and entered into the service of a foreign state (9). Nor can a wife maintain trespass as a feme sole, for breaking and entering her house, and seizing goods in her possession, by replying, in answer to a plea of coverture, that her husband had four years before deserted her and gone beyond seas, without leaving her any means of support, and that he had not since returned nor been heard of by her, that during all that time she had lived separately from him, and traded and contracted as a sole trader and single woman, and as such was lawfully possessed, &c.; the defendant rejoining that the husband was a natural-born subject, &c. and had not abjured the realm, or been exiled or banished, or relegated there-

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(1) 1 Gow's Rep. 10.

(2) Co. Lit. 133. a. 2 Bos. & Pul. 231, 2. 3 Campb. 125.

(3) Id. ibid. 2 Bos. & Pul. 231. note a. 3 Campb. 125.

(4) Co. Lit. 133. a. 1 Bos. & Pul. 358.

(5) Id. note 3. 1 Bos. & Pul. 358.

(6) Carroll v. Blencow, 4 Esp. 27. 11 East, 303. 1 Bos. & Pul.

358, 9.

(7) 1 Salk. 116.

(8) 3 Campb. 124.

(9) Ray v. the Duchesse de Pienne, 3 Campb. 123. De Gail-
lon v. L'Aigle, 1 B. & P. 359.
Tamen vide 2 New Rep. 380.
where the court of C. P. refused to
discharge the defendant on a sum-
mary application. 2 Esp. Rep.
554. 587. 2 Salk. 646.

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from (1). So, where a husband residing in the West Indies allowed the wife a weekly sum for her subsistence, she cannot be sued alone (2). And where an Englishman employed in the service of the British government, residing in a foreign country, and having lands there, upon the cessation of his employment, in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself, it was held that the wife was not liable to be sued. (3).

3. Idiocy, lunacy, drunkenness, weakness of understanding.

As the *concurrence of the mind* is essential to the validity of a contract, *it follows*, that any party is incapacitated who is, in the legal phrase, *non compos mentis*, or, as it is termed in English, of unsound mind, at the time when the agreement is supposed to have been made (4). In this description of incompetency are included all persons deprived of reason and understanding, from any causes whatsoever, whether natural or accidental, whether of a permanent or temporary nature; all idiots and lunatics; parties labouring under frenzies, or losing their intellects through grief, disease, or sickness (5); deprived of reason from drunkenness, or other causes of the like nature (6). An idiot, or natural fool, is one that hath had no understanding from his nativity. A man is said not to be an idiot, if he hath any glimmering of reason, so as to be able to describe himself, his age, or the like common matters. Idiocy has been termed a natural insanity (7), as the other species of insanity is said to be accidental or adventitious. This last designation is applied where a person, having had a competent use of reason, loses it by some distemper in the humours of the body, or hurt in the brain or its organs, or by the violence of disease, as a fever, the palsy, or the like; and this species is subdivided into that which is periodical and has lucid intervals, and that which is permanent and without intermission (8). This adventitious insanity was, at the common law, called lunacy, and it is generally styled so

(1) *Boggett v. Frier*, 11 East, 301. 1 New Rep. 80.

(2) *Macnamara and Wife v. Fisher*, in error, 3 Esp. Rep. 18. *Farrar v. Grenard*, 1 New Rep. 80. Vide 5 T. R. 679. 682.

(3) *Marsh v. Hutchinson*, 2 Bos. & Pul. 226.

(4) Co. Lit. 247 a.; and see the terms in stat. 4 Geo. 2. c. 10. 1 Ridg. P. C. 536. 3 Atk. 168.

to 174. *Dennis v. Dennis*, 2 Saund. 332.

(5) Co. Lit. 247 a. 8 Ves. 65.

(6) Id. ibid. Bull. Nisi Prius, 172. 3 Campb. 133. 18 Ves. 16. See 8 Ves. 65. and *infra*.

(7) 1 Inst. 247 a. 3 Mod. 44. 4 Co. 126.

(8) 1 Ridg. P. C. 517. App. note 1.

at this day (1). But the words unsound mind, and unsound memory, having been adopted in the reign of Edward I., the one by the stat. West. 2. and the other by the stat. *de modo levandi fines*, they have been since indiscriminately used in our law to signify not only lunacy, which is a periodical madness, but also a permanent adventitious insanity, as distinguished from idiocy (2). There is considerable difference in point of law between idiocy and the other species of mental derangement, or insanity. An idiot is presumed to be incapable of ever attaining a competent degree of understanding to govern either himself or his estate (3). And therefore the king may grant the custody of the person, and the profits of the estate, during the life of the idiot, without account, except for necessaries, and all acts ever done by the idiot to bind his estate shall be avoided. However, since the Revolution, the crown has always granted the surplus profits of the estate of an idiot to some of his family (4). But a lunatic is presumed in law to be likely to recover that understanding which he has lost; and therefore the custody of his person and estate shall be granted to the committee only during pleasure. And the committee, deducting a suitable maintenance for the lunatic and his family, shall account in chancery for the surplus profits; and shall pay them over, either to the lunatic, if he recover his understanding, or to his legal representative after his death. But all acts done by him during his lunacy, to bind his estate, shall be avoided (5). Persons born deaf, dumb, and blind are also, generally speaking, reckoned by the law as idiots, as being destitute of their senses, which ordinarily form the avenues to the understanding (6). Lord Coke also includes a party deprived of reason from intoxication, as one who is in the legal phrase *non compos mentis*; but he adds, that being deprived of reason by his own vicious act, he has no privilege thereby, but is *voluntarius dæmon*, and what hurt or ill soever he doth, his drunkenness doth aggravate it; *nam omne crimen eluctas et incendit et detegit* (7). And the ancient authorities do not scruple to assert, that although drunkenness is a kind of insanity for the time, yet as it is of the party's own procuring, it cannot turn to his avail or derogate from his contracts,

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(1) 1 Ridg. P. C. 517. App. note 1. (4) 1 Ridg. P. C. 519. App. note 1.

(2) Id. ibid.

(5) 1 Ridg. P. C. 520. App.

(3) Beverley's Case, 4 Co. 126. note 1. (6) 1 Bla. Com. 304.

2 Inst. 14. Reg. Bew. 267. Fitz. N. B. 352.

(7) Co. Lit. 247 a.

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for it is a great offence in itself; and that this doctrine holds as well with respect to criminal punishments as to dispositions of the party's lands, goods, or any thing concerning him. But it was admitted, that equity would relieve in such a case (1), especially if the intoxication were caused by the fraud or contrivance of the other party (2), and the party sought to be charged was so excessively drunk, that he was utterly deprived of reason or understanding; for it was said, that without a serious and deliberate spirit, no contract could be binding by the law of nature (3). It is now clearly established, that excessive intoxication, by which the party is bereft of reason, will invalidate a contract even at law (4). But mere weakness of understanding, where there is no fraud or surprise, does not in our law form a ground of incompetency; although it is evident, as observed by the highest authority, that a party so circumstanced may be exposed to ruin every instant (5). Nor does the rule of the common law with respect to wills appear to have been applied to deeds and other contracts (6); for to establish a will, it is not sufficient to shew that the testator had sufficient memory to answer plain and familiar questions, but he ought to have had a disposing memory, so as to be able to make a disposition of his lands with understanding reason: "this," says Lord Coke, in speaking of wills, "is such a memory as the law considers safe and perfect." (7) But to take advantage, in the making of any contract whatever even of the most ordinary description, of a mind naturally weak, to obtain an unequal bargain, is highly culpable; and if coupled with circumstances of fraud apparent either from the extraordinary nature of the instrument, from the exercise of undue influence, from the want of adequate motive or consideration, or the like, is a ground for setting aside an agreement, especially in courts of equity (8). In considering the effect of lunacy or

(1) 1 Cha. Ca. 202.

(2) 3 P. Wms. 130. note a.

(3) Fonbl. Treat. Eq. 68.

(4) Bul. Ni. Pri. 172. 18 Ves. 16. 3 Campb. 133.

(5) Vide, on this subject, *Sherwood v. Sanderson*, 19 Ves. 286. *Ex parte Barnsley*, 3 Atk. 168. *Lord Donegal's case*, 2 Ves. 407. See post 65. as to relief in equity.

(6) Fonbl. Treat. Eq. 70, 1.

(7) *Id. ibid.* *Marquis of Winchester's case*, 6 Co. 23 a.

(8) Vide Fonbl. Treat. Eq. 68, 9.

7 Bro. P. C. 70. 2 id. 77. 2 P. Wms.

203. 2 Ves. 627. 2 Atk. 324.

Tothill, 10. *Taylor v. Obee*,

3 Price, 83. 3 Ves. & B. 187.

2 Madd. 430. And see in general

as to the several species of fraud

in contracts, and the modes

of relief, Fonbl. Treat. of Equity,

b. 1. c. 2. sec. 3. notes, and sec. 7, 8,

9. and notes. *Bridg. index. tit.*

Fraud, 1. per totum.

other deprivation of reason with respect to contracts, we shall treat first of some peculiar cases in which such a defence is not sustainable; and afterwards mention in what cases and by what modes the incapacity may be set up.

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A contract of record, as a statute merchant, statute staple, or recognizance, or a fine or recovery, is binding, even upon a lunatic or an idiot, or other party *non compos mentis*, and upon his heirs and executors, and all persons claiming in privity with him (1). The reason is, that credit must be given to the official authority under whose superintendence such securities are taken, that the parties to them were not incompetent. "The law," says Lord Hobart, with his usual peculiarity and force of language, "finds these persons not so disabled, nor admits the averment of such disablement, because it is certified by the invincible and indisputable credit of the judge, that they were perfect and able persons. And so here is a law of policy that doth not cancel the law of nature, but doth only bind it in point of form and circumstance; it being better to admit a mischief in particular, even against the law of nature, than an inconvenience in general; and it is not the law of nature to admit any improbable surmise against authentic record or evidence." (2) But although securities of record, as fines or recoveries suffered by infants or lunatics, are binding upon them at law, yet relief may be obtained in chancery, and the parties taking them may be compelled in that court to reconvey the estates, for no species of fraud can be so palpable as the obtaining of these solemn securities from parties so incapacitated (3). Formerly, indeed, it was considered, that a person *non compos* could in no case be admitted to set aside a contract executed by him; it being said, that no man should be allowed to stultify himself; and that it was impossible, in the nature of things, that "when a party recovered his memory, he should know what he did when of non-sane memory." (4) And although some thought that, by the ancient common law, he might have a writ of *dum fuit non compos*, to avoid a grant made during his incompetency (5), yet

(1) Co. Lit. 247 a. 4 Co. 124. & Beame, 42.
and 145—193. 2 Inst. 483. Bro. (4) 4 Co. 124. See also Powell
tit. Fr. 75. 10 Rep. 42 a. Bro. on Contr. 11. 12.

Fait, Inrol. (5) Fitz. Nat. Brev. 466. 6 ed.

(2) Hob. 224. Co. Lit. 247. f. 449. Treat. on Eq. 50. New-

(3) Tothill, 42. 99. 1 Rol. land on Contr. 16, 17. 2 Bla.
Rep. 115. 1 Ves. 289. 2 Ves. Com. 291. cites Britt. c. 28. fol.
403. 3 Atk. 313. and see 3 Ves. 66. Reg. fol. 228.

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a contrary opinion afterwards prevailed; and it was considered, that the acts of idiots or lunatics could only be avoided by *scire facias* at the suit of the king, which must have been brought in their life-time, but to which they were no parties, or by privies in blood, or privies in representation, and not by privies in estate or in tenure; nor in any cases by the incompetent parties themselves (1). And there is a case where it was determined, that the plea of lunacy afforded no answer to an action on a bond (2). But this decision has been overruled; and it is now held, that idiocy, lunacy, or other disability of this nature, affords a sufficient defence to an action on a deed or bond, or on any other contract (3). Such a disability totally annuls a deed; and is available under the plea of *non est factum* (4). And so drunkenness, by which a party is deprived of reason, is a bar to any action for any contract made under its influence (5); and may be given in evidence, under the plea of *non est factum*, to a deed; of *non concessit*, to a grant; or of *non assumpsit*, to a promise. (6) If, therefore, it be stated, as inducement in an action of slander, that a certain agreement was made, the averment will be falsified by proof that the party to the supposed agreement was in a state of complete intoxication when he signed it (7); or in an action for work and labour, proof that the plaintiff was in a state of intoxication when he signed that which is insisted on by the defendant as an agreement, dispenses with the necessity of producing it (8). There are, indeed, authorities in the court of chancery, in which it has been laid down, that the mere proof of a party's having been intoxicated when he executed a deed, does not of itself afford a ground for relief, for that this would be to encourage drunkenness (9); but that if any contrivance were used to draw a party in to drink, or any unfair advantage were taken of his situation, the agreement would be set aside. In a late case, however, where this doctrine was alluded to by the master of the rolls, it was ad-

(1) 4 Co. 123 b. 124 a. Com. Dig. Idiot, D. 4, 5, 6. Treat. on Eq. 50, 1, 2.

(2) *Id. ibid.* Stroud & Marshall, Cro. El. 398. and see *id.* 622.

(3) *Agate v. Boen*, 2 Stra. 1104. and the case there cited.

(4) *Id. ibid.*

(5) *Cole v. Robins*, Bul. Ni. Pri. 172. 3 Campb. 133.

(6) *Pitt v. Smith*, 3 Campb. 133.

(7) *Id. ibid.*

(8) *Fenton v. Holloway*, 1 Stark. 126.

(9) *Cory v. Cory*, 1 Ves. 19. *Rich v. Sydenham*, 1 Ch. Ca. 202.

Johnson v. Medlicott, 3 P. Wms. 130. *Goodman v. Sense*, 2 Eq. Abr. 183. pl. 2.

mitted, that if a party were in a state of such excessive intoxication as to be deprived of reason, an agreement made by him would, without any proof of contrivances used to bring him into that situation, be invalid even at law (1). This, therefore, is now to be taken as the law upon the subject; and it rests upon sound principles: for however desirable it may be that drunkenness should be repressed, yet the rules of good faith and justice are not to be violated to attain this purpose; and there can be no reason why a contract should enure for the benefit of a party who has obtained it from another at a time when he was not master of his own actions.

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nacy, drunken-
ness, weakness of
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Further, a contract may be avoided which is obtained through the application of such external violence or constraint as is deemed in point of law to be sufficient to prevent the free exercise of the reason or understanding of the party by whom it is made. A contract so entered into is said in law to have been made under *duress* (from the Latin word *durities*), of which there are several species; for it may be either by actual imprisonment of the person or *per minas*; as by menace of imprisonment, of mayhem, of violence to be offered either to member or life (2). If the contract be sought to be avoided on the ground of imprisonment, the confinement must be shewn to be an unlawful one, and not by process of law (3). But even where imprisonment is originally lawful, the application of undue violence or restraint, which is tortious and unlawful, will avoid an agreement (4). And any violent restraint or confinement, though not in a common prison, is in law an imprisonment (5). Imprisonment by process of one who has no jurisdiction, is also duress (6). An arrest made without any cause of action is said to be sufficient to avoid a deed given under it; or an arrest without good authority, though for a just debt, or an arrest by warrant from a justice of the peace, on a charge of felony, when no felony had been committed (7). Where a bond was given by a third person, on the discharge of one who had been unlawfully impressed, con-

4. Duress.

(1) *Cooke v. Clayworth*, 18 Ves. 15, 16. 1 Rol. Abr. 687. 1. 20. 8 Ed. 3. 57. and 43 Ed. 3. 106. b.

(2) 2 Inst. 482, 3. 1 Bla. (5) *Id. ibid.*
Com. 136, 7. (6) *Com. Dig. Pleader*, 2 W.

(3) 2 Inst. 482. 1 Rol. Abr. 19. 1 Rol. Abr. 687. and see 687. 43 Ed. 3. 10 b. 11 Hen. 4. 2 Vern. 497.
6 b. (7) *Bul. Ni. Pri.* 172.

(4) *Id. ibid.* *Bul. Ni. Pri.* 172.

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ditioned for the man's being returned into custody, or in default thereof, for the payment of £50, the bond was held void, for the impressing of the man was unlawful; and besides, the officer had no power to commute the services of one who was impressed, nor to discharge him in consideration of money to be paid (1). And menace of imprisonment is sufficient to avoid a contract; for liberty is, in this case, as carefully guarded by the law as life itself (2). But the fear which is sufficient to avoid a contract must be a present fear, occasioned by some present or future danger, not a mere suspicion of the approach of danger, nor such an apprehension as would arise in the mind of a weak or timorous man, but such as would alarm a firm man; such as the fear of death, or of bodily torment (3). The fear of battery only, which may be slight, will not amount to duress, as the fear of mayhem will, or of loss of life or member (4). Nor is the fear of the burning of the party's houses, or destruction or asportation of his goods, sufficient to invalidate a contract; for the law considers that compensation may be obtained for wrongs like these by an action for damages (5). But the security given under duress will be invalid, although the form of it may differ from that demanded by the party by whom the duress is applied. Thus, in the instance given in the books, if A. menace me, except I make unto him a bond of £40, and I tell him I will not do it, but I will make unto him a bond of £20, the court will not expound this instrument to have been given voluntarily; according to the maxim, *non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit* (6). The duress by which a contract may be avoided, must also in general be such as is offered to the party against whom it is sought to be enforced, and who seeks to avoid it, and not to a stranger. It is said, however, that the husband may avoid a contract on account of duress to the wife; or a parent, on account of duress, to his child (7). But a servant cannot at law avoid a deed executed to relieve his master from duress, nor *vice versa* (8). Nor is duress to the principal a bar to an action against his

(1) Pole v. Harrobin, 9 East, 417. in note.

(2) 2 Inst. 482. Com. Dig. Pleader, 2 W. 20. 1 Bla. Com. 130.

(3) 2 Inst. 483. Brac. l. 2. fol. 16 b. Rex v. Southerton, 6 East. Rep. 126.

(4) 2 Inst. 483.

(5) Id. ibid. Bul. Ni. Pri. 173. 2 Stra. 917. acc. 1 Rol. Abr. 687. contra.

(6) Bul. Ni. Pri. 173.

(7) 1 Rol. Abr. 687. Vide Brown, Ch.C. 267—276. Freeman.

(8) 1 Rol. Abr. 687.

surety (1). Duress from a stranger, by the procurement of the party who derives the benefit from a contract, is a good cause for avoiding it (2); or the imprisonment of a servant by his master will vitiate an obligation made by the servant to a third person. (3)

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4. Duress.

It has been laid down, that a statute merchant may be avoided by *audita querela*, if obtained through duress of imprisonment (4). But the averment of duress does not appear to be in general admissible to contradict a record; as for instance, to defeat a deed inrolled (5). In an action on a deed or specialty contract, duress must be specially pleaded, and is not available under the plea of *non est factum*. (6)

A disability to contract may also arise, as already observed, from the national character of a contracting party, and from his standing in a hostile relation towards this country. By the general rule, no contract can be entered into between a British subject and an alien enemy; an agreement so made is altogether invalid, and is incapable of being enforced in any court of justice, either in law or equity, or at any time whatsoever, either during the war or after its termination (7). In a late case, where a British subject, resident here, having in his hands the proceeds of certain goods of an alien enemy, the latter drew a bill of exchange upon the English resident (the defendant in the action), and indorsed the bill to the plaintiff, an English born subject, resident in the hostile country, who sued upon the instrument after peace restored, it was held that he could not recover (8). The reason of the rule is, that a contract made between a British subject and an alien enemy must presuppose the existence of pacific communications between the parties, and is therefore repugnant to the measures of our own government in declaring war; that it has a tendency to betray the subjects of this country into breaches of their allegiance; and serves to strengthen and assist the enemy,

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enemies.

(1) Com. Dig. Pleader, 2 W. 16 Hen. 7. 5 b. Com. Dig. Pleader, 2 W. 19.

(2) 1 Rol. Abr. 688. 43 Ed. 3. 6. (6) 2 Inst. 485. Bul. Ni. Pri. 172. 2 Chitty on Pl. 496.

(3) Id. ibid.

(4) 1 Rol. Abr. 687. 20 Ed. 3. (7) Brandon v. Nesbitt, 6 T. R. 23. Bristow v. Towers, id. 35. 8 East, 289. 13 Ves. 64. Ante 1 vol. 377, &c.

(5) 1 Rol. Abr. 862. 1. 15. (8) Willison v. Patteson, 7 Taunt. 439. 1 Moore, 133. S. C.

(5) 1 Rol. Abr. 862. 1. 15.

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mies.

by opening to him avenues for traffic. In the jurisprudence of our own, as well as of almost every other country, the situation of an alien enemy precludes him from deriving any benefit from a contract during the war, or appealing to the courts of justice for redress. No action can be maintained in any court of law in this country, either at the suit of an alien enemy, or by any party in trust for him (1); nor can a person labouring under this incapacity maintain a bill in equity for relief (2); nor can it afford any just ground for distinction, where the claim sought to be enforced has arisen to an alien enemy during war, and is disallowable on that account, that the action for it is not brought till after the cessation of hostilities; for whether an enemy receives compensation during the war, or obtains satisfaction afterwards, the difference is only in the degree, and not in the nature of the benefit; and protection and encouragement are in each case afforded to him, either by the advantage immediately derived, or by the prospect of eventual indemnification (3). But where the reason of the rule ceases, the rule itself is also at an end. In a late case, where a British subject, detained prisoner in France, drew a bill of exchange in favour of another British subject also detained there, upon a British subject resident in this country, and the payee afterwards indorsed the bill to a Frenchman, a banker at Verdun, it was held, that the latter might bring an action upon the bill in this country, against the acceptor, on the return of peace (4); for in this case, the party who drew the bill having been detained in France as a prisoner of war, the rule, which prohibits communications on the part of a British subject with a hostile territory, did not apply. From the necessity of the case, the drawing of the bill in France, and the subsequent negotiation of it, were allowable; there was nothing illegal in the concoction of the instrument, nor was there any disability in the plaintiff on the record. Where hostilities arise after the making of a contract, the performance of it is prevented by that circumstance, according to the principles already adduced (5); but where a debt accrues before the breaking out of a war, the right to recover it

- (1) *Brandon v. Nesbitt*, 6 T. R. 23. *Bristow v. Tower*, 6 T. R. 35. *Kensington v. Inglis*, 8 East, 289, 290. *Ex parte Rush*, 13 Ves. 64.
(2) *Albretch v. Lufman*, 2 Ves. & Beame, 323. *Daubigny v. Davallen*, 2 Anstr. 462. Acc. as to bills of discovery; but see 2 V. & B. 325. 7, 8.
(3) *Gamba v. Le Mesurier*, 4 East, 407.
(4) *Antoine v. Morshead*, 6 Taunt. 237.
(5) *Oorn v. Bruce*, 12 East, 225.

is suspended in consequence of supervening hostilities, but is capable of being enforced on the return of peace. In a case of bankruptcy, therefore, a creditor, who appears to have become an alien enemy since the debt arose, may have his claim entered, although the payment of the dividend must be reserved (1). And it has been determined, that a British agent, effecting a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before an action commenced, is entitled to recover against the underwriter, if he plead only the general issue, which is a plea of perpetual bar (2). It is indeed one of the prerogatives of the crown to seize and sue for debts belonging to alien enemies; and it should seem, that in the case just stated, the crown might interfere to seize the debt, notwithstanding the recovery in the action; but in the form of the plea adopted, the disability was not available in favour of one of the contracting parties.

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mies.

The disabilities ordinarily attaching upon alien enemies, or upon subjects of this country trading with them, may be removed by licence from the crown. As the king possesses the sole power of dispensing peace or war, so he may remove the disabilities arising out of a state of warfare in favour of particular individuals, or of a certain portion of a community. The king, says Lord C. B. Comyns, may grant letters of safe conduct to an enemy, and by this means take him into his keeping and protection (3); and independently of letters of safe conduct or passports, a person residing here by the license and under the protection of the sovereign, is not to be regarded as an alien enemy. Some proof indeed of a licence from the crown is necessary to remove the disability; and the mere fact of the party's being a British resident does not seem to be sufficient. Where a party against whom an action was brought, pleaded that the suit was instituted on the behalf of H. E., a Dane, an alien enemy, not resident within the King's dominions under letters of safe conduct, licence, or protection, and issue was taken on the licence, it was held, that a licence formerly granted by the king to the said H. E. then an alien friend, authorizing him to undertake a voyage to an enemy's country, and to return to England, did not operate as a licence to reside here, although

(1) *ExparteBoussmaker*, 13 Ves.
71.

(2) *Flindt v. Waters*, 15 East,
260.

(3) *Com. Dig. Prerogative.*

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the voyage did not terminate till after the commencement of hostilities with Denmark, and though he remained here unmolested (1). But where proof of a licence can be duly given, it is clear that the disability of an alien enemy is removed, and that he may sue in his own name; and that any trading between British subjects and alien enemies may be validated by licence (2). In the course of the late war, the conflicting relations in which the different states of Europe were placed towards this country by the overruling influence of France, rendered it necessary for the interests of Great Britain, that the prerogative of granting licences should be frequently called into exertion. Acts of parliament were also passed by which this prerogative was much strengthened; and in particular a power was conferred upon the king in council, or secretary of state, &c. of granting in certain conjunctures dispensations from the navigation laws, which being the statutes of the realm, could not be infringed upon by the unassisted prerogative of the crown. The licences so issued were granted frequently to British subjects to trade with an enemy's country, sometimes to parties who were themselves alien enemies, and generally for a certain voyage, either from or to this country, either to export commodities with which the British markets were overstocked, or to import such articles as they stood in need of. With regard to the construction of these licences to trade, it is sufficient to observe in this place, that they impliedly legalise every act necessary for their due and effectual prosecution, and enable the parties, in whose favour they are made, to contract and sue, and to do every other act within the scope of their authority, as if no disability existed. (3)

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tainer, etc.

The other disqualifications which remain to be noticed in this place, as interfering with the capacity to contract, are those of bankruptcy, outlawry, attainder of felony, &c. which rather prevent a contracting party from retaining for his own use any benefit derived through the medium of a contract, than render him absolutely incompetent. By the operation of the bankrupt laws, all the property and effects, both real and personal, of a party against whom a commission of bankruptcy has issued, are divested out of him for the benefit of his creditors; and as the

(1) *Boulton and others v. Do-* 332., and the cases there cited.
brece, 2 Campb. 163.

(3) *Usparicha v. Noble*, 13 East,

(2) *Usparicha v. Noble*, 13 East, 332. Ante, 1 vol. 498.

bankrupt is protected from actions for debts accruing to him before he obtains his certificate, so his assignees may sue upon all his contracts. The commission has relation back to the act of bankruptcy, except in some instances where dealings have been had with the bankrupt *more than two months* before the date of the commission, and without knowledge of an act of *bankruptcy or insolvency* (1); and until the bankrupt has obtained his certificate, he is incapable of acquiring to himself any beneficial right or property by a contract with a third person. Such rights and property belong to the assignees under the commissioners, and are to be distributed for the benefit of his creditors. It is a good plea to an action on a promissory note, and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff; and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person of sufficient capacity, and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his after-acquired as well as present personal property and debts (2). So, to a *scire facias* against bail on their recognizance, it is competent to the defendants to plead in bar against the issuing of execution, that before the issuing of the *alias writ of scire facias* the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c. assigned to the provisional assignee, who before pleaded, assigned to the assignee under the commission, who was entitled to sue the defendants (3). The general rule, however, is, that although the claim of an uncertificated bankrupt is defensible, yet it can only be defeated in favour of his assignees and his creditors, and not by any third person (4). Thus an uncertificated bankrupt may maintain an action for work and labour and materials supplied (5); and if the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to

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(1) 49 Geo. 3. c. 121.

(2) Kitchen v. Bartsch, 7 East, 53.

(3) Kinnaird v. Tarrant, 15 East, 622. 1 Co. Rep. 215; but see *infra* 3 Moore, 96. 1 Holt, 172.

(4) Fowler v. Down, 1 Bos. & Pul. 44, 48. Webb v. Fox, 7 T. R. 391. Webb v. Ward, 7 T. R. 296.

(5) Silk v. Osborn, 1 Esp. Rep. 156. Nias v. Adamson, 3 Bar. & Ald. 225.

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time, this is evidence of such a contract between him and his assignees as will enable him to recover from them a compensation for his work and labour (1). It has been ruled, that an uncertificated bankrupt may maintain an action for not accepting goods sold, unless his assignees interpose; and that the assignment under the commission affords no defence to the purchaser under the plea of the general issue (2), from which a principle applicable to the law of contracts may be readily extracted. And in a late case, an action of trespass *quare clausum fregit*, was holden to be maintainable by a tenant from year to year, who had become bankrupt after the commission of the trespass, and before the commencement of the suit; for the bankrupt might sue as a trustee for his assignees, and had a good title against all persons but them; and the right of action did not pass to the assignees by the assignment, unless they interfered (3). After the debts are paid, the bankrupt is clearly entitled to the surplus property.

By *outlawry*, either in a civil or criminal suit; by attainder of treason, petit treason, whether clergyable or otherwise; or of petit larceny; or of the crime of striking in any of the king's courts; by self-murder; standing mute on arraignment; by the finding by the jury of a flight in treason, felony, or petit larceny, as well as by the commission of certain other heinous offences (4); all the offender's debts and choses in action are forfeited to the crown, from the time of any of these offences being found against him; and he consequently becomes incapable of making a contract for his own benefit, and is divested of his right to sue in courts of justice. An attainted party is considered in law as one *civiliter mortuus*; he may acquire, but he cannot enjoy; he may acquire, not by virtue of any capacity in himself, but because, if a gift be made to him, the donor cannot make his own act void, and he reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing vests in the crown by its prerogative (5). By attainder, all the personal property, and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and therefore attain-

(1) *Coles v. Barrow*, 4 Taunt. 771.

(2) *Cumming v. Roebuck*, Holt, C. N. P. 172.

(3) *Clark v. Calvert*, 3 Moore, 96., and see *id.* 612. 10 Ves. jun.

94. 3 Ves. & B. 105. 3 Ves. jun. 255. 16 Ves. 474.

(4) 1 Chitty, Crim. Law, 730.

(5) Per Cur. *Bullock v. Dodds*, 2 B. & A. 258.

der may well be pleaded in bar to an action on a bill of exchange, indorsed to the plaintiff after his attainder (1). And where the plaintiff, being indicted for felony, sued a banker for money the plaintiff had found him, which was surmised to be the produce of the felony, the court, on application, gave the defendant time to plead in a month after the trial of the indictment (2). And where, on conviction for felony, the capital punishment is commuted for transportation, under the statute 8 Geo. 3. c. 15., the offender is not restored to his civil rights till after the expiration of the term for which he is transported; for by the term transportation in that act is meant, not merely the conveying of the felon to the place of transportation, but his being conveyed, and remaining there during the whole term (3). But where the disability has been removed by a pardon (4), or reversal of the outlawry or attainder, the offender becomes, as a matter of course, again competent to contract or sue. And whilst the incapacity continues, it is not available in favour of the party affected by it; nor can it protect him from demands made against him, and therefore may be charged in execution in a civil action (5). It seems also that, as a matter of favour, though not of right, the property of the offender will be applied by the crown for the benefit of his creditors. (6)

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IV. We have to examine the consideration of a contract, being the price or motive for entering into it (8). The general rule is, that it is essential to the validity of a *simple* contract or agreement, not under seal, that it should be founded on consideration; and that if it be merely voluntary or gratuitous, without consideration, the agreement is *nudum pactum*; that a deed or security under seal is binding on the party by whom it is executed, although there was no consideration for making it; though it will be invalid, in some cases in equity, unless it be founded on a sufficient consideration, so far as it interferes with the rights of creditors or of purchasers claiming for valuable consideration.

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(1) Bullock v. Dodds, 2 Barn. & Ald. 258.

(2) Deakins v. Praed and another, 4 Taunt. 825.

(3) Bullock v. Dodds, 2 B. & A. 258.

(4) Com. Dig. Abatement, E. 3.

(5) 1 Bos. & Pul. 171. Com. Dig. Abatement, E. 3. 15 East, 465.

(6) Dougl. 542. Tidd. Prac. 157.

(7) See division of the subject, ante 2.; and as to the consideration of a contract in general, see Chitty on Bills, 5 ed. 68 to 89. Bac. Abr. Assumpsit, C. Com. Dig. Action in Case on Assumpsit, B.

(8) 2 Bla. Com. 443.

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ations (1); that a written agreement not under seal has not, as was formerly supposed, any peculiar privilege belonging to it, to preclude a party by whom it is given from setting up that it is *nudum pactum* for want of consideration; but that a negotiable security as a bill of exchange or promissory note carries with it *prima facie* evidence of consideration, in respect of which it is binding in the hands of a third party to whom it may be negotiated; that with regard to the parties themselves, however, between whom a negotiable security primarily passes, and before it is circulated to strangers, the consideration may be entered into. The consequences of the want of consideration are, that where the agreement is not under seal, no action or suit can be maintained upon it (2); and that if the object of it be to transfer personal property, possession of the chattel must be delivered to make the transfer valid; for a gift of personal property by an instrument not under seal is invalid, unless perfected by delivery (3). But although a parol agreement without consideration is invalid, so that no action can be maintained for the non-performance of it; yet if the party entering into it proceed in the performance, he will be liable for any negligence or unskilfulness, or other dereliction of duty in the course of it. Thus a count in a declaration, stating, that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day; that the defendant accepted the retainer, but did not perform the work within the time, *per quod* the walls of the plaintiff's house were damaged, cannot be supported. But a count omitting, like the former, any statement of a consideration, but alleging that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings, and to use these old materials, but that the defendant, instead of using these, made use of new ones, thereby increasing the expence, is good (4). Where a deed or security under seal is executed, an action is maintainable upon it, although made without consideration (5); and a voluntary conveyance, which is good in law, is likewise sufficient in equity, as against the party himself, and all claiming

(1) Ante, 7, 8.

(2) Ibid.

(3) Irons v. Smallpiece, 2 B. & A. 551. Bunn v. Markham, 2 Marsh. 532. 7 Taunt. 280. 4 Bar. & Ald. 650, and cases there col-

lected. What a good *donatio mortis causa*, see 3 Mad. 184.

(4) Elsee v. Galwad, 5 T. R. 143.

(5) Ante, 8. Irons v. Smallpiece, 2 B. & Ald. 551.

under him as volunteers; though an agreement to settle an annuity, when without consideration, will not be enforced in equity (1). But equity will relieve where the party who executed the conveyance acted under a mistake or misapprehension of his rights (2); or where he was, so old or infirm, that he was by undue influence prevailed upon to execute (3); or where the deed was executed for a particular purpose which never took effect (4). And equity will not supply a defect in a voluntary conveyance, nor decree a specific performance in favour of a mere volunteer (5). And where the rights of creditors or of purchasers claiming for valuable consideration, or other parties legally interested, intervene, a voluntary conveyance without consideration is invalid both at law and in equity (6). And in the Court of Chancery, a distinction exists between good and valuable considerations; for in that court, where an agreement is made in consideration of natural love and affection, or from meritorious motives, to save the peace and honour of a family, the execution of it will be decreed (7); but natural affection is not a sufficient consideration to support an action on a promise in a court of law.

The *valuable* considerations upon which contracts may be founded, have been divided by the civilians in respect of their *subject matter* into four species. First, *do ut des*; as for instance, when I deliver money or goods, on a contract that I shall be repaid money or goods for them. Of this kind are all loans of money upon bond or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio ut facias*; as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it

(1) 1 Mad. V. Ch. Rep. 558. post 79.

(2) Hawes v. Leader, Cro. Jac. 270. Brookbank v. Brookbank, 1 Eq. Ca. Ab. 168. 1 Fonblanque on Equity, 274, and cases there collected.

(3) Birch v. Blagrave, Ambl. 264. Ward v. Lauts, Prec. in Chanc. 182.

(4) Griffiths v. Robins, 3 Maddox, 191. Platamone v. Staple, Cooper's Ca. in Ch. 250. Dow-

ling v. Mill, 1 Madd. 541.

(5) 1 Fonblanque, 348. 3 Bro. Rep. 13. 2 Ves. jun. 271. Sed vide 2 Ves. jun. 170. 183. Halliday v. Hudson, 3 Ves. 210. 4 Ves. 802.

(6) Lodge v. Dicus, 3 B. & A. 611. Higinbotham v. Holmes, 19 Ves. 88. Experte Berry, 19 Ves. 218. 1 Fonblanque, 270.

(7) Stapylton v. Stapylton, 1 Atk. 2. 2 Ves. 11. and 1 Fonblanque, 272.

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may be to forbear on one side in consideration of something done on the other; as, that in consideration A. the tenant will repair his house, B. the landlord will not sue him for waste. Or it may be for mutual forbearance on both sides, as that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles, so as to avoid interfering with each other. 3. The third species of consideration is, *facio ut des*: when a man agrees to perform any thing for a price, either specifically mentioned or left to the determination of the law to set a value to it, as in the former case, when a servant hires himself to his master for certain wages, or an agreed sum of money; here the servant contracts to do his master's service, in order to earn that specific sum. In the latter case he is hired generally; and then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, *do ut facias*, which is the direct counterpart of the preceding; as, when I agree with a servant to give him such wages, upon his performing such work, which we see is nothing else but the last species inverted; for *servus faciat, ut herus dat, and herus dat, ut servus faciat*.

It would be an endless labour to enumerate the several matters which may or may not form considerations for valid contracts. The general rules which the law has laid down upon the subject, are few and simple, and are easily applicable to particular instances. The leading rule, with respect to consideration, is that it must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment sustained, at the instance of the party promising, by the party in whose favour the promise is made (1). No actual benefit needs accrue to the party undertaking to make his promise obligatory; a promise may be founded on some damage to be sustained by another, as on some suspension or forbearance of his right, or on a benefit to be afforded by him to a third person a stranger to the contract. A promise to a party in consideration of his doing voluntarily what he was legally bound to do, or of his omitting to do something which he had no right to do, is not binding, the consideration being insufficient (2). But a promise may be founded on a by gone consideration, executed at the request of the party promising, or on a moral obligation, which has attached upon him. A promise by the

(1) Com. Dig. Assumpsit, B. 1. East, 455. Williamson v. Clef. 8. Nerot v. Wallace, 3 T. R. 523.
17. Jones v. Ashburnham, 4 (2) Peake, 72. 1 Taunt. 515.

defendant in consideration of the plaintiff's forbearing to sue the defendant (1), or a third person at the defendant's request (2), either totally (3) or for a certain or a reasonable time (4), for a demand recoverable either in law or equity (5) is founded on a sufficient consideration, and is therefore valid; though a promise in consideration of forbearance for some time, or a short or little while, has been holden, on a writ of error, not to be sufficient (6). A promise by an executor (in writing), whether he has assets or not, to pay a debt of his testator, in consideration of forbearance for a reasonable time is valid (7). But a mere promise to pay by the executor, without any new consideration, does not make him liable to answer out of his own estate; he is still chargeable only to the extent of the assets in hand, and as he would have been if no promise had been made (8). A promise by the heir at law, in consideration of forbearance, to pay a debt due upon the bond of his ancestor, is not valid, unless it appear that the heir was named in the bond (9); but if the heir at law be named in the bond, it is said that a promise by him to pay the debt, in consideration of forbearance, is valid, whether he actually had assets by descent (10) at the time of the promise or not (11). To constitute a sufficient consideration on the ground of forbearance, there must be some party in existence towards whom forbearance may be exercised; and therefore where the plaintiff declared that A. since deceased was indebted to him in a certain sum, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would forbear and give day of payment of the debt (not stating to whom) the defendant promised, the declaration was holden insufficient on demurrer; for no benefit was shown to have been afforded to the defendant, nor any detriment sustained by the plaintiff; it not being stated that there

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- (1) Com. Dig. Assumpsit, B. 1.
(2) 9 Co. 94 a. 1 Rol. Abr. 27.
5. 30.
(3) 1 Rol. Abr. 27. l. 5.
(4) Moore, 854. 1 Rol. Abr.
26. pl. 44. l. 50. 3 Bul. 207.
1 Sid. 45.
(5) T. Raym. 372. Cro. El.
768. 1 Sid. 89. 2 Stark. 230, 1.
(6) 1 Rol. Abr. 23. pl. 25, 26.
see. 1 Sid. 45. Cro. Car. 438.
but see 1 Leo. 61. Cro. Car. 241.
V. Com. Dig. Ass. B. 1.
(7) Johnson v. Whitchurch, 1
Rol. Abr. 24. pl. 33. on demurrer.
Barber v. Fox, 2 Saund. 134 d. in
notes, where the cases are col-
lected. 29 Car. 2. c. 3.
(8) Hawes v. Smith, 2 Lev. 122.
See Hindley v. Russel, 12 East,
232.
(9) Barber v. Fox, 2 Saund.
136.
(10) Lord Gray's case, 1 Rol.
Abr. 28. pl. 57.
(11) 2 Saund. 137 a. vide tamen.
1 Rol. Abr. 28. pl. 57. Com. Dig.
Ac. sur Assump. B. 1.

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was any party towards whom forbearance could be shown (1). The omission however of the name of the party to whom the forbearance was given is cured after verdict (2). But the giving up a suit, instituted to try a question, respecting which the law is doubtful, is a good consideration, for a promise to pay a stipulated sum; and therefore where a ship, having on board a pilot required by law ran foul of another vessel, and proceedings were instituted by the owners of the latter vessel to compel the owners of the former one to make good the damage, the former vessel being detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained agreed to give an indemnity, and pay a stipulated sum by way of damages, on the claims being given up, and the amount of the damage proved; it was held, that as there had been contradictory decisions upon the point whether ship owners were liable for an injury while their ship was under the controul of the pilot required by law, there was a sufficient consideration for the promise made by the agents to pay the stipulated damages (3). So the relinquishment of a doubtful title is a good consideration for a promise (4). A promise made by a creditor to his debtor, to accept less than the amount of his debt, is not valid, unless the promise is founded on some new consideration; the promise is valid if the debtor procures a part of the debt to be guaranteed by a third person as surety (5), if damages are liquidated by the contract, which would otherwise be uncertain (6); if payment is to be made at an earlier day, or a different place (7), if the nature of the action is altered (8), if a fund is appropriated for the payment (9), or if a chose in possession is given for a chose in action. Where a creditor previously to the discharge of an insolvent debtor, requested him not to include the debt in his schedule, stating that the amount would never be called for, it was held that after the debt had been omitted according to the creditor's request, he could not maintain an action for it (10). The assent of a party to submit a matter in dispute to arbitra-

(1) *Jones v. Ashburnham*, 4 B. L. 218. East, 455.

(2) *Marshall v. Birkenshaw*, 1 New Rep. 172.; and see *Cro. Jac.* 396. 543.

(3) *Longridge and another v. Dorville and another*, 5 B. & A. 117.

(4) *Thornton v. Fairlie*, 2 Moore, 406.

(5) 11 East, 399. 2 Campb. 126. 2 Campb. 383. 1 Mont.

(6) *Adams v. Taplin*, 4 Mod. 89.

(7) *Co. Lit.* 212 b. *Purnel's case*, *Cro. Car.* 8. *Hutt.* 76.

(8) *Goring v. Goring*, *Yelv.* 10.

(9) *Heathcote v. Crookshand*, 2 T. R. 24. *Cooling v. Noyes*, 6 T. R. 263.

(10) *Carpenter v. White*, 3 Moore, 231.

tion, has been held to be a good consideration. But to constitute a sufficient consideration, the benefit afforded, or detriment sustained, must be of some legal worth and value. Thus, a promise in consideration of a devise by will (1), or of forbearance for a little while (2), has been holden insufficient, for the devise may be revoked, or the debt so pretended to be forborne, may be sued for instant. So a promise to a mariner on a storm arising of a further sum in consideration of extra service on board the vessel is insufficient, he being already bound to use his utmost exertions for the sum for which he has been hired (3). But where a consideration exists it will be sufficient, although apparently very trivial, to support a promise; for a court of justice has no scales to weigh the adequacy of consideration, where it is in its nature valuable; and very slight services undertaken at the request of another have been holden sufficient to support a promise. Thus a promise made by the assignee of a lease to the owner of the estate to pay certain arrears of rent in consideration of his producing a certain deed, is sufficient to support an action of assumpsit (4). So a promise to pay the debt and costs of an action against a third person in consideration of the plaintiff requesting the sheriff not to execute a writ of *fiery facias* is binding, the consideration being sufficient to support it, although it do not appear the sheriff executed the writ. (5)

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There is also a class of considerations, which although they do not proceed from the act of the plaintiff, yet being beneficial to the defendant, are sufficient to support his express promise in favour of the plaintiff though a stranger (6); and therefore if A. let land to B., in consideration of which the latter promises A. to pay the rent to C., C. may maintain an action on that promise (7); but, however, it has been said, that in pleading it is necessary to state the promise to have been made to C., and that the above rule holds in other cases besides mere mercantile transactions (8). If a contract be made upon two considerations, and one of them cannot be performed, this will not avoid the

(1) 1 Rol. Abr. 23. Poph. 183.
Bac. Abr. Assumpsit, C. 1 Powell,
353. Com. Dig. Assumpsit, B. 1.

(2) Id. ibid. supra 67.

(3) Peake, 72, supra. Brown
v. Crump, 1 Marsh. 567. *aliter* in
favor of a passenger, 3 B. & P. 612.

(4) Sir Anthony Sturling v. Al-
bany, Cro. Eliz. 67—150.

(5) Pullin v. Stokes, 2 Hen.
Bla. 312.

(6) Com. Dig. tit. Assumpsit.
Where third persons may sue,
2 Moore's Rep. 417.

(7) 3 Bos. & Pul. 149. n. n.
1 Bos. & Pul. 101. 1 Saund. 210.
1 Powell, 353. Stra. 392.

(8) 1 Bos. & Pul. 101. Carth. 5.

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contract; and in an action thereon, the damages shall be intended to be wholly given for the good consideration (1), and the void consideration need not be proved (2); but if one of the considerations is found false by the jury, the action fails (3); or if one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing. (4)

2. Time when
consideration
arose.

The validity and sufficiency of considerations on which assumpsits may be founded, may also be considered with respect to the *period of time* at which the benefit of them results to the contracting parties; in which mode of regarding them, they have been divided into *four species*, viz. the *executed*, the *executory*, the *concurrent*, and the *continuing*; that is, a contract may be made for performance by one party, for a consideration past, or for consideration to be afterwards derived, or for a consideration arising at the very time of performance, or for a consideration to continue, which would have been suspended but for the performance stipulated for (5); and

Executed
consideration.

First, of *executed* considerations: — From the very nature of a contract founded on consideration, as distinguished from one that is merely gratuitous and voluntary, the consideration should be superinduced by the agreement or compact itself. How therefore, it may be asked, can a contract, to the validity of which a consideration is requisite, be said to be binding, where the consideration is executed or past at the time the agreement is made? The law has been stated to be, that no contract can be founded on a consideration which is entirely executed, past, and gone; but an agreement is valid which is founded on a consideration executed in part, as where the act, which is the *substratum* of the agreement, is completely executed, but is of such a nature as to produce a continuing obligation. Where a service has been performed for the benefit and at the request of another, who promises in consideration thereof to perform some act, the antecedent consideration is sufficient to support such promise (6). Where A's servant was arrested in London for a trespass, and J. S., who knew A., bailed him,

(1) Com. on Contracts. Cro. Eliz. 149. 1 Sid. 38. cont. 4 Leon. 3.

(2) Com. Dig. tit. Action on Assumpsit, B. 13.

(3) Cro. Eliz. 848.

(4) Cro. Eliz. 199. 1 Sid. 38. 4 Leon. 3. Cro. Jac. 103.

(5) See 1 Chitty on Pleading, 295, &c.

(6) Com. Dig. Action upon the Case upon Assumpsit, B. 12. 1 Rol. Abr. 2. 11, 12. See Osborne v. Rogers, 1 Saunders, by Serjt. Williams, 264, note 1.

and afterwards A., from motives of friendship, promised to save him harmless, but he was eventually charged; it was held that there was no consideration to found the promise, for the bailing was past and executed before the promise was made (1). But in this case it did not appear that the master had previously requested his friend to become bail for the servant (2), or that the act done was in contemplation of law for the master's benefit. So a promise alleged to have been made in consideration of money expended about the defendant's affairs, without adding, at his request, is insufficient (3). So, if after a sale and delivery of goods to one person, a stranger promises to pay the vendor the amount, the promise is merely *nudum pactum*, and therefore invalid (4). But a promise made in consideration of service already performed for another at his instance; as for example, in consideration of my having laboured for a pardon at his request, is valid (5). So where A. paid to B. the whole of a demand claimed by him, but part of which was believed to be due to a third person, and B., after receiving the whole money, promised to indemnify A. against the third person's claim, the indemnity was holden valid (6). So, to put another instance, if I verbally request a merchant to credit another for goods, and he gives credit accordingly, the past consideration is sufficient to support a written contract afterwards formally signed by me (7). And although where the consideration is past, a previous request is necessary, and must be stated in the formality of legal pleading; yet the proof of an actual request may sometimes be dispensed with, being presumed from other evidence. Where a party has derived benefit from the consideration, that circumstance will be in many cases sufficient to charge him, and will be equivalent to a previous request, as where a man pays a sum of money for me, or buys any goods for me, without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous request to do so; but it is still necessary to aver in

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- (1) 1 Rol. Abr. 11. 2 pl. 2. Hob. 105. Moor. 866. 1197.
1. 25. Dyer, 10 Eliz. 272. 1 Rol. 11. 1. 40—45.; and see
(2) 1 Rol. Abr. 11. 2 pl. 3. numerous instances Com. Dig.
1 Saund. 264. n. 1. Action on Assumpsit, B. 12.
(3) Com. Dig. Action on the (6) Lord Suffield v Bruce, 2
Case on Assump. F. 6. 1 Rol. 11. Stark. 175.
1. 20. (7) Lyon v. Lamb, Fell. on
(4) 1 Rol. Abr. 27. pl. 49. Merc. Guar. 39, 40. 240.
(5) Lampligh v. Brathwaite,

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the declaration that the money was paid and laid out for me at my special instance and request, and my subsequent conduct will be evidence of it (1). Where, however, a request is relied upon, and no express request can be proved, the case must be such as fairly raises the presumption of an implied one. Where a tenant from year to year of a house, at a yearly rent, became bankrupt in the middle of the year, and his assignees entered and kept possession for the remainder of the year, it was held that the landlord could not maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their request for the bankrupt to occupy during the time that elapsed before the bankruptcy (2).

Contracts which are founded on an antecedent *moral* obligation, attaching on the party by whom they are made, may also be mentioned as founded on executed consideration. As where a woman having procured a loan to be made at her separate instance during marriage, after the death of her husband promises to pay the money (3); where an infant, on attaining his full age, promises to pay a debt from which his minority protected him (4); where a bankrupt or insolvent expressly promises to pay a debt which accrued before he obtained his certificate or discharge (5); where a promise is made to pay a debt barred by the statute of limitations (6); where, in the case already quoted, a guarantee is void for want of writing, and after the goods have been supplied, a written undertaking is given (7). In all these cases no action could have been brought but for the subsequent express promise, the original contract having been either void in its creation, or the remedy upon it extinguished or barred; but the subsequent promises attached upon the antecedent moral obligation; for where a party has derived a benefit from another, for which some positive law

(1) 1 Saund. 264, note 1. Hayes v. Warren, 2 Stra. 933. 2 Barn. Rep. K. B. 55. 71. 140. 3 Burr. 1671.

(2) Naish v. Tatlock, 2 Hen. Bla. 319.

(3) Lee v. Muggeridge, 5 Taunt. 36.; but see 1 Stra. 94.

(4) Trueman v. Tenton, Cowp. 544. Southerton v. Whitlock, 1 Stra. 690.

(5) Lynbury v. Weighton, 5 Esp. 198. Fleming v. Hayne, 1

Stark. 370. Mucklow v. St. George, 4 Taunt. 613.

(6) Ld. Raym. 389. Bryan v. Horseman, 4 East, 599.

(7) Ante, 71. A declaration on a contract to pay an annuity in consideration of past cohabitation only, without any statement that defendant was the seducer, or other act to impose a moral obligation, is insufficient. Binnington v. Wallis, 4 B. & A. 650.

prevents him from being amenable, the obligation in conscience to discharge the debt is of itself sufficient to support a promise.

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Instances also arise in which parties on whom certain *legal obligations* are imposed, have in consequence of the non-observance of their duty, become liable to actions in form *ex contractu* at the suit of persons in whose favor it ought to have been performed; and such contracts may be referred to the class founded on executed consideration. Where a husband went abroad and left his wife, who died in his absence, a third person (the wife's father) who voluntarily paid the expences of her funeral in a mode suitable to the husband's rank and fortune, though without his knowledge, was held entitled to recover back the sum expended (1). Numerous instances of the same description might be cited. Where a pauper, residing, by agreement with the overseers, out of the parish, was suddenly taken ill, and a surgeon called in by a third person, without the previous request of the overseers, attended upon the pauper and cured him; and afterwards the overseers promised to pay the surgeon, the promise was held valid (2). In this case the promise was supported by a legal as well as a moral obligation (3), for the overseers were bound to provide for the poor; and when the humanity of another induced him, from the urgency of the occasion, to perform those offices which ought to have been performed by the parish officers, a contract arose on their part to pay the usual remuneration. In a similar case, where a pauper residing in the parish of A., received during illness a weekly allowance from the parish of B., where he was settled, it was held that an apothecary who had attended the pauper might maintain an action for the amount of his bill against the overseers of B., who had expressly promised to pay it (4). So where a pauper had his leg accidentally fractured in one parish, and was conveyed to the next house in an adjoining parish, and was confined there and visited by the overseer, and attended by the surgeon who attended the parish poor, with the knowledge of the overseer, it was held that the surgeon might have assumpsit against the overseer for the expences of the cure; for there was not any obligation against the parish where the accident happened to pay these expences, and the overseers knowing of, and not repudiating the surgeon's

(1) Jenkins v. Tucker, 1 Hen. Bla. 90.

(2) Watson v. Turner, Bul. Ni. Pri. 129. 147. 281.

(3) Wing v. Mill, 1 B. & A. 105. 2 East, 506.

(4) Wing v. Mill, 1 B. & A. 104.

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attendance, was equivalent to a request (1). Where a payment is so necessarily made by one party in discharge of a *legal liability* attaching upon another, it seems that an action is maintainable against the latter without an express promise (2). But a moral obligation is not sufficient to raise an implied promise (3). Nor will the law raise an implied promise, on the part of the parish where a pauper is settled, to reimburse the money laid out by another parish, in which he happened to be, in providing necessary medical assistance for him. (4)

Executory con-
sideration.

The consideration for a contract is *executory* when one party promises to pay money, or do some act, in consideration of the other party doing some other act, as occurs in case of a promise to pay money for work to be done. So, if a contract be made for the sale of goods for a certain price, the contemplation of law is, that the payment of the price shall be cotemporaneous with the delivery of the goods; that the purchaser shall not be entitled to compel the delivery without payment of the price, nor the vendor to compel payment without delivering the goods; and if the intention of the contract be, that payment shall not be demanded till the expiration of a certain time, a stipulation should be introduced into the bargain accordingly, as for instance, that the goods shall be delivered to-day, but that payment shall be made at the expiration of a month. The advantage of which contract to the vendee is, that he acquires a right to the goods at the day specified, without payment or tender of the price, and may bring his action accordingly for recovery of the specific property, or damages for the non-delivery thereof; and there is plainly a sufficient consideration moving to the vendor, for it may be presumed that the price would be enhanced on account of its being payable at a distant day, and he relies upon the vendee's promise, and upon the contemplation, that if payment should be withheld, a satisfaction may be recovered in damages. Here the consideration which moves the vendor to contract seems to be properly stiled an *executory one*, the *promise*, indeed, of the vendee, is concurrent and cotemporary with that of the vendor, and runs along with the contract; for it is in the very nature of consideration that it should be incorporated with, and should arise at

(1) *Lamb. v. Bunce*, 4 M. & S. 275.

(3) 2 East, 506.

(2) *Simmons v. Wilmott* and others, 3 Esp. Rep. 91.

(4) *Atkins v. Barnwell*, 2 East,

the same time as the object for which it is transferred. But as in the above-mentioned instance, the circumstance of the money being payable to the vendor at a distant day is in effect and substance the consideration for his agreement, the contract on his part seems fairly referable to the class of agreements founded on executory considerations. Where an instrument is long and defectively formed, questions sometimes arise of considerable nicety, whether, in the mode in which the respective covenants and stipulations are interlaced, any certain acts of one party are to be absolutely performed *in presenti*, or at a certain time in future, and the correlative acts of the other party to remain executory; or, whether the correlative acts on both sides are dependent upon one another, and are to be performed at one and the same time? Questions like these, however, relate to the construction of an agreement, and cannot be conveniently entered upon in treating of the consideration on which an agreement may be founded (1).

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But besides the executed or executory, there may be a *concurrent* consideration, that is, a contract may be made for some benefit or right to be acquired by one party, either at a present or future time, in consideration of some right or benefit to be acquired by the other party at the same time. This, indeed, is the natural *ordo*, if I may so term it, of a contract, and it obtains more especially in cases of sale or exchange of property. As where Mr. Justice Blackstone states, that "a contract may be either executed or executory: executed, as if A. agrees to change horses with B., and they do it immediately, in which case the possession and the right are transferred together; executory, as if they agree to change next week, in which case the right only vests, and their reciprocal property in each other's horse is not in possession, but in action: for a contract executed (which differs nothing from a grant) conveys a chose in possession; a contract executory conveys only a chose in action." In this passage from the learned commentary, the *consideration* moving either of the two parties to contract is in each *contract* instanced, *concurrent* with the benefit to be conferred by himself upon the other party. In every case where a contract can be said to be founded on consideration, it should seem that, in propriety of language, the consideration ought to arise at the time of

Concurrent con-
sideration.

(1) As to these cases and what constitutes a condition precedent, &c. see 1 Chitty on Pleading, 295 to 319.

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making the contract, and to accompany and support it; but a contract seems properly described to be founded on a concurrent consideration, where the two parties must concur and co-operate at one and the same time, as well in the formation of the contract as in their endeavours to reduce it into practical execution.

As in a sale of goods for a certain price, the purchaser is not entitled to the goods without payment or tender of the price, nor the vendor to the price agreed upon without delivering or offering to deliver the goods. Wherever, in making a contract, two concurrent acts are stipulated for, no action can be maintained by one of the parties, without averring that he has performed, or done all in his power to perform, his own branch of the agreement (1). The case of an agreement founded on mutual promises might also perhaps be mentioned as a species of the concurrent consideration; but the objection to it seems to be, that the meaning of the terms executed, executory, concurrent, and continuing, evidently extends beyond the mere concoction of the agreement; and where a contract is founded on consideration, it would be difficult to state a case in which it is not founded on mutual promises. If, for instance, one party should promise to pay another £20, no action would be maintainable on this promise, for there is no consideration; and if he should even promise to pay the money either *in præsentia* or at a future day, in consideration of services to be performed, no action would be maintainable, unless the other party should consent to perform the service, the evidence of which assent might indeed be derived from his receipt of the money, or other acts manifesting a concurrence. But until such assent could be proved, the promise would be rather in the nature of a proposal than an agreement; and being destitute of mutuality, could not be made the foundation of an action. The case above mentioned of the sale seems to afford an appropriate instance of the concurrent consideration.

Continuing con-
sideration.

Lastly, A contract may be founded on a *continuing* consideration. To illustrate this, there is a case in the books, of a promise by a landlord, "to save a lessee in possession, harmless, both for the time past and future, in consideration of his having paid his rent 'very well;' for prompt payment of the rent (as the reason is laid down) is a continuing consideration, whilst the

(1) *Morton v. Lamb*, 7 T. R. note, pl. 5. 1 Chitty on Pleading, 125—129. 1 Saund. 320 c. 309, &c.

lessee remains in possession (1).^v This case seems to be somewhat vaguely stated; but from the language of the court, according to one report of it, it appears to have been considered, that the continuing relation between the parties was sufficient to sustain the landlord's promise. The court said, that the consideration that the plaintiff was in possession, and had paid rent, and was in future to pay it, was a sufficient cause for the landlord's defending his possession (2). The continuance of the relation of landlord and tenant has been holden, on a motion in arrest of judgment, to be a sufficient consideration for a promise by the tenant not to carry away any dung or soil, &c. from the farm demised, and to cultivate the land according to usage and the course of good husbandry (3). But the mere continuance of the relation does not seem to be sufficient to support a promise to manage the farm in a mode not required by usage or implied by law; it should be shewn that the tenant came in under the special terms, or that something has been done by the landlord, since the commencement of the tenancy, to purchase the contract from him; for where a relation has been established between two parties, either by express contract or by operation of law, the continuance of which may be insisted upon by either of the parties on certain terms, a promise made by one of them, without any extra benefit secured to himself, for some further remuneration to the other, is *nudum pactum* void, for want of consideration; and therefore a declaration stating a promise, in consideration of the defendant's being tenant, to repair the premises he holds, is invalid (4); and a promise made by the master of a ship in distress, to pay an extra sum to one of the mariners, as an inducement to extraordinary exertion on his part, has been holden void; for the seaman was bound by law to exert himself to the utmost in the service of the vessel, and therefore the promise was merely gratuitous, and unsupported by any consideration, either continuing or otherwise (5). So a promise to pay a witness for loss of time is not binding (6). In respect of a positive legal obligation, an action may be maintained by the mere operation of

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(1) Com. Dig. Action upon Assumpsit, B. 12. Pearle v. Unger, Cro. El. 94. 1 Lec. 102.; and see the instances of Cont. Cons. stated. 1 Rol. Abr. 12, 13. Com. Dig. ub. supra.

(2) Cro. El. 94.

(3) Powley v. Walker, 5 T. R. 373.

(4) 1 Marshall's Rep. 567.

(5) Harris v. Watson, Peake's Rep. 72.

(6) Willis v. Peckham, 1 Bro. & Bing. 515.

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law, without any express promise; and when such an obligation is of a continuing nature, it seems to be an appropriate instance of the consideration now under discussion, as distinguished from the species already mentioned. But those considerations upon which contracts may be founded, as upon previous services performed on request, or previous benefits conferred, and which have been already mentioned as executed ones, are sometimes described as continuing; and in Com. Dig. they are treated of under the title of "Consideration executed in part," (and in part continuing) (1). Thus, if A. marry the daughter of B. without his consent, and B. afterwards agree to the marriage, and in consideration of it, promise, in writing, to pay £100 to A., this has been determined to be a valid promise; for the natural affection of the father, and the advancement of the daughter, are continuing considerations (2).

3. Legality of
consideration.⁽³⁾

The consideration for a contract, as well as the promise for which that consideration is given, must also be *legal*; for it is an established maxim in our law, that *ex turpi causa non oritur actio*, the illegality of a contract may arise either from the provisions of the *common* or the *statute* law. At *common law* any contract is invalid which violates the precepts of religion or morality, or the rules of public decency. Thus a contract for the sale of blasphemous or obscene or libellous prints is void, and no action can be maintained upon it (4). Wherever a contract is made directly in furtherance of some immoral practices, the rule *ex turpi causa non oritur actio* applies. Thus if a house is knowingly let for the purposes of prostitution, an action will not lie for the use and occupation of it (5). So in an action for board and lodging, where it appeared that the plaintiff kept a house of bad fame, and, besides what she received for the board and lodging of the unfortunate women who lived with her, partook of the profits of their prostitution, Lord Kenyon declared, that such a demand could not be heard in a court of justice (6). But a demand of this kind for board and lodging, or for dresses sold, is not vitiated by the creditor's having known of the pro-

(1) Com. Dig. Act. sur Assump.
B. 12. 1 Rol. Abr. 12, 13.

(2) Id. ibid. Marsh v. Craven-
ford, Cro. El. 59. Dyer, 272 b.
Palm. 56. 2 Leo. 111. 224.

(3) As to this in general, see
Bac. Ab. Assumpsit, E. Com. Dig.
Action on case, B.

(4) Fores v. Jones, 4 Esp. Rep.
97. Dubost v. Beresford, 2
Campb. 511.

(5) Girardi v. Richardson, 1
Esp. Rep. 20. 1 Campb. 348.
1 Bos. & Pul. 340, 1.

(6) Howard v. Hodges, Selw.
N. P. 67.

fligate pursuits of the party to whom they were supplied, unless they were furnished with a view to support the illegal mode of life, or the creditor expected to be paid from the profits to be derived from it (1). A promise in consideration of future illicit cohabitation is illegal and void (2). A deed, however, made *præmium pudicitiae*, as in consideration of past seduction, by way of reparation for the injury, and to put an end to the illegal intercourse, is not invalid (3). And an agreement by a defendant to allow a woman, with whom he had cohabited, an annuity for life, in case they should separate, and provided she should continue single, was in one case holden valid (4). But a declaration in assumpsit, stating, that plaintiff had cohabited with defendant as his mistress, and that it was agreed that no further immoral connexion should take place between them, and that defendant should allow her an annuity as long as she should continue of good and virtuous life and demeanour, and that thereupon, in consideration of the premises, and that plaintiff would give up the annuity, defendant promised to pay as much as the annuity was reasonably worth, was held bad, on demurrer, on the ground that the declaration did not state any sufficient consideration to found a promise (5). Nor is a bill in equity sustainable against an executrix to enforce a parol agreement by the testator, when single, to settle an annuity on the plaintiff, a married woman, who had lived with the testator during the time of her separation from her husband; for such an agreement, if not illegal, is at most only a voluntary one. (6)

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An agreement contrary to public policy, and injurious to the community at large, is also invalid. As, for instance, a stipulation in general restraint of trade, to engage (for example) not to carry on a trade in any part of England (7); if indeed the con-

Impolitic, &c.

(1) Bowry v. Bennett, 1 Campb. 348.

(2) Walker v. Perkins, 3 Burr. 1568. 2 Ves. 160. 5 Ves. jun. 293.

(3) Armandale v. Harris, 2 P. Wms. 432. Turner v. Vaughan, 2 Wils. 339. Ex parte Cottrell, 2 Cowp. 742. Hill v. Spencer, Amb. 641. Cray v. Rooke, Forrest, 153. Binnington v. Wallis, 4 B. & A. 650. Lloyd v. Johnson, 1 Bos. & Pul. 340. 1 Esp.

Rep. 13. Fores v. Johnes, 4 Esp. Rep. 97. Cowp. 39. Bowry v. Bennett, 1 Campb. Rep. 348.

(4) Gibson v. Dickie, 3 Maule & Selw. 463.

(5) Binnington v. Wallis, 4 Barn. & Ald. 650.

(6) Matthews v. —, 1 Mad. V. Ch. Rep. 558.

(7) 2 Marshall, 273. 1 Leon. 179. Dyer, 355. b. 1 Hawk. P. C. ch. 83.

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tract be only for a limited restraint of trade, and founded on consideration, it is valid (1); or a contract to withdraw an opposition to a bill in parliament (2); or a contract that three shall buy a ship, and that it shall be registered in name of one only, or for the sale of a registry of a ship (3); or a contract against policy of insolvent acts (4); a simoniacal contract (5); a smuggling contract (6); a contract which tends to the maintenance of suits; an agreement for the sale of offices, or bribery or extortion, is illegal. So a contract which has a tendency to induce a public officer to act in dereliction of his duty, as a promise to a sheriff of money or other consideration for suffering a prisoner to escape, &c. (7); or for the execution of process in a certain mode, at the request of the party, is illegal. But a promise, by a party interested, to indemnify a sheriff in the execution of process in a case of doubt, is valid. A promise made by a friend of a bankrupt, when on his last examination, to pay certain sums, with the embezzlement of which the bankrupt was charged, in consideration that the commissioners would forbear to examine him as to those sums, was holden void; the commissioners being bound by their office to pursue the examination for the benefit of the creditors (8). A contract in restraint of marriage (9); or in procuration of marriage (10); or a contract to pay a commission for recommending a customer to a person (11); a contract which has a tendency to prevent the due course of justice, being made in consideration of the dropping of any criminal prosecution, whether

(1) 2 Marshall, 273. 1 Leon. 179. Dyer, 355. b. 1 Hawk. P. C. ch. 83.

(2) 2 Maddox, 356.

(3) Battersby v. Smith, 3 Maddox, 110. 2 Mer. 78.

(4) Jackson v. Davison, 4 B. & A. 691, and see post.

(5) Cro. Car. 337. 353. 361. 1 Rol. Ab. 18. l. 5. Fytche v. Bishop of London. Cunningham's Law of Simony, 52. 4 T. R. 359.

(6) Biggs v. Lawrence, 3 T. R. 454. Vandyck v. Hewitt, 1 East, 97. See the law upon this subject, ante 1 vol. 784.

(7) 10 Co. 102. Cro. Eliz. 199. Smith v. Stotesbury, 2 Burr. 924. 1 Bla. Rep. 102. S. C. — v. —

T. Jones, 24. Cart. 223. Yelv. 197. 2 Bulstr. 213. Cro. Jac. 652. 1 Lord Raym. 279. 1 Lev. 98.

1 Sid. 132. 1 Keb. 483.

(8) Nerot v. Wallace, 3 T. R. 17.

(9) Lowe v. Peers, 4 Burr. 2225.; see also 2 Vern. 102. 215. 2 Eq. Ca. Ab. 248. 1 Atk. 287. 2 Atk. 538. 540. 10 Ves. jun. 429. Hartley v. Price, 10 East, 22. 1 P. Wms. 181, 2. Gibson v. Dickie, 3 Maule & S. 463.

(10) Arundel v. Trevillian, 1 Ch. Rep. 47. Hall v. Potter, 3 Lev. 411. Show. P. C. 76. 4 Bro. P. C. 144. 8vo. ed. Co. Lit. 206. (b.)

(11) 4 Esp. Rep. 179.

for felony or misdemeanour, of suppressing evidence, of compounding felony or other public crime, unless with the sanction of the court of record in which the proceeding was depending. (1)

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Where a contract is detrimental to the rights or interests of third persons, and therefore fraudulent as to them, it is invalid at common law. Thus where a composition deed is entered into, a secret stipulation between the insolvent and a creditor, by whom it is executed, that the latter shall receive a sum of money or security in addition to what is payable to the creditors in general, is void; for this is not only oppressive towards the insolvent, but a fraud upon the general creditors (2). So, in another case, where the plaintiff, who was master joiner in one of his majesty's dock-yards, undertook to procure himself to be placed on a superannuated list, and the defendant, in consideration of his succeeding the plaintiff, engaged to allow him the extra pay from the yard-books; the agreement, having been made without the knowledge of the navy board, to whom the appointment belonged, was holden void (3). The instances which might be adduced of contracts void at common law, on the ground of fraud, are extremely numerous; but as the principle has been already stated, it seems unnecessary to pursue it through all its varieties. It has been decided, that if A. agree to give B. a sum of money for goods in advancement of C., a secret agreement between B. and C. that the latter shall pay a further sum, is void as a fraud upon A., although the bill of sale is made to A., and B. cannot recover such further sum

Fraudulent con-
tract.

(1) *Nerot v. Wallace*, 3 Term Rep. 17. *Kaye v. Bolton*, 6 Term Rep. 134. *Nerot v. Wallace*, 3 Term Rep. 22. 1 Leon. 180. *Edgecombe v. Rood*, 5 East, 299. 2 Wils. 349. *Harding v. Cooper*, 1 Stark. 467. *Norman v. Cole*, 3 Esp. 253. but as to the latter case, see *Cotton v. Thurland*, 5 Term Rep. 405. *Lacaussade v. White*, 7 Term Rep. 535. *Howson v. Hancock*, 8 Term Rep. 577. *Williams v. Hedley*, 8 East, Rep. 381. *Hob. 106*. 1 Rol. Abr. 11, 12. pl. 6. tit. Action sur Case.

(2) *Cockshott v. Bennett*, 2 T. R.

763. 4 East, 372. 15 Ves. jun. 52.; and where deeds and gifts, given in fraud of purchasers and in contravention of insolvent acts, are void, see 1 *Fonblanque*, 270, 6, 8, 9. *Cockshott v. Bennett*, 2 T. R. 763. *Jackson v. Lomas*, 4 T. R. 166. *Jackson v. Duchaire*, 3 T. R. 551. *Leicester v. Rose*, 4 East, 372. *Cooling v. Noyes*, 6 T. R. 263. *Bryant v. Christie*, 1 Stark. 329, and 2 Stark. 416.

(3) *Parsons v. Thompson*, 1 Hen. Bla. 322. see *Garforth v. Fearn*, 1 Hen. Bla. 327. *Blackford v. Preston*, 8 T. R. 89.

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against C. (1). An agreement by a bankrupt or his friend to pay a sum of money to a creditor, to induce him to sign the bankrupt's certificate, is void; for the signing of the certificate ought to be a voluntary act on the part of the creditor, and exempt from any undue bias (2). An agreement, however, by a friend of the bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good in law; for no policy of the law is violated, nor is any fraud committed by such an agreement (3). An agreement to recommend customers to a tradesman, in consideration of the payment of a poundage or commission on the goods sold, was held invalid in a case before Lord Ellenborough, C. J. on the ground of its being a fraud upon the customers (4). But a contract for the transfer of the good will of a business, in consideration of money, or other valuable recompense, is good in law; such an interest, indeed, is well known to be constantly made the subject of sale and purchase in point of fact, and has been held to be lawfully transferable, even in the case of a business apparently requiring great trust and confidence, as between attorneys or practisers in medicine. (5)

A *wager* upon an indifferent matter, which has no tendency to produce any public mischief or individual inconvenience, is legal; but to make the wager legal, the subject matter of it must be perfectly innocent, and have no tendency to immorality or impolicy (6). A wager between voters on the event of an election (7), a wager upon the event of a war (8), or concerning the produce of any particular branch of the revenue (9), or tending to inconvenience or degrade courts of justice (10), or

(1) Jackson v. Duchaire, 3 Term Rep. 551.

(2) Nerot v. Wallace, 3 T. R. 17. Smith v. Bromley, Dougl. 696. 5 Geo. 2. c. 30. s. 11.

(3) Kaye v. Bolton, 6 T. R. 134.

(4) Wyburd v. Stanton, 4 Esp. 179.

(5) Bunn v. Guy, 4 East, 190.

(6) Jones v. Randall, Cowp. 37. Good v. Elliott, 3 Term Rep. 693. Earl March v. Piggott, 5 Burr. 2802. 1 Lord Raym. 69. 3 Salk. 14. 176. 6 Mod. 128. 12 Mod. 69. 81. 258. Carth. 338. vide Gilbert v. Sykes, 16 East, 161.

(7) Allen v. Hearn, 1 Term Rep. 56.

(8) Foster v. Thackery, 1 Term Rep. 57. n. (b.) Lacauissade v. White, 7 Term Rep. 535. Furtado v. Rodgers, 3 Bos. & Pul. 194.

(9) Atherfold v. Beard, 2 Term Rep. 610. Good v. Elliott, 3 Term Rep. 693. Shirley v. Sankey, 2 Bos. & Pul. 130. Tappenden v. Randall, id. 467. S. P.

(10) Brown v. Leeson, 2 Hen. Bla. 43. Henkin v. Guerss, 12 East, 247. Squires v. Whisken, 3 Camp. 140.

concerning an abstract question of law or legal practice (1), in which the parties have no interest, or operating to produce a breach of the peace, is illegal. A wagering contract, under which the defendant received from the plaintiff 100 guineas on the 31st May 1802, in consideration of paying the plaintiff a guinea a-day as long as Napoleon Buonaparte, then first consul of the French republic, should live, which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, was holden void on the grounds of immorality and impolicy (2). A wager upon the sex of a third person is void, because it is likely to lead to indecent evidence; and any wager is illegal which is likely to be injurious, either in itself or its consequences, to the rights or interests of a third person. (3)

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It seems to be a good general rule, that wherever a contract has for its basis the performance or omission of some act, the doing or omitting of which would contravene the provisions of the *statute-law*, the agreement is invalid, no less than it would be where in any similar case the provisions of the common law might be infringed by the agreement made (4). But a distinction has been introduced into our law-books,—under the two several denominations of *mala prohibita* and *mala in se*,—between the different species of offences which the law recognizes; and a very celebrated writer goes so far as to assert, that where an act is prohibited by a penal statute, and is merely an offence *juris positivi*, not being in itself and abstractedly immoral or illegal, the rules of morality and good conscience are no further concerned than in enjoining submission to the penalty, if levied, and do not regard the supposed offender as involved in any turpitude, provided the penalty be paid (5). But this doctrine of Sir W. Blackstone has been denied by some very able authors, as well as by some of our greatest and most able judges (6); and apparently with great reason; for the slightest reflection must convince us, that the penalty annexed to a penal statute

(1) *Henkin v. Guerss*, 12 East. 247.

(2) *Gilbert v. Sykes*, 16 East, 150.

(3) *Da Costa v. Jones*, Cowp. 729. 2 Lev. 161. 1 B. & A. 683.

(4) See cases *infra*, and *Bensley v. Bignold*, 5 Barn. & Ald. 335. where it was held that a printer

cannot recover for labour or materials used in printing any work, unless his name is affixed to it, pursuant to 39 Geo. 3. c. 79. s. 27.

(5) *Bla. Com.* but see *Sedgwick's Commentary on Bla. Com.*

(6) *Aubert v. Maze*, 2 Bos. & Pul. 374, 5.

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for the enforcement of any of its provisions, is intended, not as a statutory compensation, but as a punishment for an act committed; not as the price at which any one who comes under the law may purchase at his pleasure a dispensation from the main body of its enactments, but as the *penalty* which the legislature has thought fit to impose, in any certain case, upon any one offending against the regulation. The only rule which can be safely given and acted upon is, that in each case the scope and purview of the law must be regarded to ascertain whether any certain action is prohibited by it or not. Subject to which observation, it may not be improper to keep in view the several distinctions which the law itself has established between the several species of statutory offences, and which it has laid down for our guidance with the utmost clearness and precision. Where, for instance, an act is prohibited generally by statute, the punishment which the law annexes to the offence is in general by indictment, and this is that species of crime which our law writers usually understand by the term *malum in se* (1); or where the act prohibited by the statute is of a private nature, and such as only to affect individuals, the remedy is by an action on the case. Where an act is prohibited by statute, and a pecuniary penalty annexed to the commission of it, the enforcement of the penalty is the only mode of punishment which the law allows; still, however, the penalty, as here enacted, includes the idea of punishment for a supposed transgression, and when the penalty attaches, the wise provision of the law has been infringed. And the contrary opinion seems to be founded on an adherence to the letter, instead of the spirit of the statute. It would be to little purpose that the legislature has so anxiously declared, in the preambles and otherwise, the main scope and design of some enactments, where it was feared that they might fail to speak for themselves, if such an evasion of a law as Mr. Justice Blackstone's doctrine contemplates could be substituted for a performance of it. All the modern decisions concur, that wherever a contract directly contemplates the purposed infraction of a penal law, it is invalid, although the offence may only have been prohibited under a pecuniary penalty, and although contracts may not have been expressly mentioned in the prohibitory enactment (2). "Every contract made for or

(1) See Co. Inst. tit. Monopolies.

(2) 5 Barn. & Ald. 335. Carth. 252. 1 Taunt. 136.

about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, thence no prohibitory words in the statute (1).” And the circumstance of both parties being ignorant of the law, and being innocent of any intention to violate, will not constitute any distinction (2); and therefore, where a druggist, before the passing of the stat. 51 Geo. 3., sold drugs to a brewer, knowing that they were to be used in his brewery (3), and where a person lent money for the purpose of paying stockjobbing difference (4), it was held that they could not recover. And the illegality affects all contracts calculated to violate the law; and therefore, where a voyage has been declared illegal, a person cannot be sued for carelessly stowing goods to proceed upon it (5). But where the contract is in itself and on the face of it lawful, an illegality in collateral circumstances, which were not disclosed at the time of making it, and which did not form part of the agreement between the parties, will not vitiate it. As where an act is about to be performed, the legality of which is at present doubtful, and which may eventually turn out not to have been warranted in law, and a promise of indemnity is given, this promise is valid, although the act which formed the subject of the indemnity afterwards appear to have been an unlawful one (6). So although the statute 3 H. 8. c. 11. provided that no one should practise as a surgeon in London, or seven miles round, without being licensed by the college of surgeons, and imposed a penalty of £5 per month for so practising, it seems to have been considered, that an unlicensed practitioner might maintain an action for business done as a surgeon within these limits; for the practising was only prohibited under a penalty; the statute did not provide that no fees or charges should be recovered, and the illegality formed no part of the agreement between the plaintiff and defendant. (7)

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(1) Per Holt, Ch. J. Carth. 252.

(2) 3 Barn. & Ald. 126.

(3) Langton v. Hughes, 1 M. & S. 595.

(4) Cannan v. Bryce, 3 Barn. & Ald. 179.

(5) 3 M. & S. 117, but see 4 Campb. 183. Holt, C. N. P. 105. 107.

(6) Iles v. Boxall, 2 Bos. & Pul. 89.

(7) Gremaire v. Le Clerc Bois Valon, 2 Campb. 144.

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Where the objection of illegality arises under any of those statutes by which contracts are expressly declared void, the whole of the contract will in general be vitiated by an illegality in any part of it. In this respect some decisions seem to show that there is a distinction between illegality arising from statute and that arising from the common law; for where a statute expressly makes a deed or contract void, there, as the law must receive its full operation, the whole instrument is vitiated; but at common law, where the several parts of an agreement are in their nature distinct and severable, only so much as is illegal will be rejected, and the rest may stand good (1). Where a bond was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented, to resign, upon notice of the son's being qualified to take it, and to present him, the bond was holden to be good for the payment of the money, even although the part of the condition for the presentation of the obligee's son might be simoniacal (2). Where the objection to the contract is founded on statutory provision, the effect of illegality in any one of the stipulations seems to extend itself somewhat farther; but even here the instrument is only so far vitiated as the declared intention of the legislature appears to render necessary. The mortmain act 9 Geo. 2. c. 37. makes void all gifts or grants, &c. to charitable uses; but where a deed contains several limitations, one of which is void as being to a charitable use, the statute does not avoid the other limitations, although included in the same deed with the illegal one. Lord Chief Justice Gibbs, in giving judgment upon this point, observed, it is said that if the deed be void as to part, it is void as to the whole. If the objection had been derived from the common law, it is admitted that would not be the consequence, but it is urged, that the statute makes the whole deed void. As the counsel for the plaintiff puts it, there is no difference between a transaction void at common law, and one void by statute; if an act be prohibited, the construction to be put on a deed conveying property illegally, is, that the clause which so conveys it is void, equally whether it be by statute or common

(1) 4 Maule & Selw. 66. 1 (2) Newman v. Newman, 4 M. Saund. 66, note 1. & S. 66.

law; but it may happen that the statute goes further, and says, that the whole deed shall be void, to all intents and purposes; and when that is so, the court must so pronounce, because the legislature has so enacted, and not because the transaction prohibited is illegal. I cannot find in this act any words which make the entire deed void. The words are "all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, or of any estate or interest therein, shall be absolutely and to all intents void." I think this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void; but that the statute makes nothing more void, and that the deed, so far as it passes other lands not to a charitable use, is good. (1)

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In stating the rules as to illegality arising from express statutory provision, it is proper to premise that the general principles will be here brought forward as applicable to those species of contracts which most usually arise in practice: it would be foreign to our present purpose to detail all the instances of illegality by which a contract may be affected, either in the common or the statute law; one species of illegality introduced by statute, which vitiates any contract that may be infected with it, is that of *usury* (2). By the 12 Ann. c. 16. it is enacted, that no person shall take upon any contract, directly or indirectly, for loan of any monies or commodities, above the value of £5 for the forbearance of £100 for a year, and so after that rate for a greater or less sum, or a longer or shorter time; and that all bonds, contracts, and assurances for payment of any principal or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of £5 in the hundred as aforesaid, shall be utterly void. And that every person who shall upon any contract take, accept, and receive by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest, of any wares, merchandize or other things whatsoever; or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment, &c. at a greater rate than £5 per cent. per ann., shall forfeit treble the value of the sum, &c. so lent, &c.

(1) Doe v. Pitcher, 6 Taunt. all former statutes. 13 Eliz. c. 8.
359. See also Gaskell v. King, repealing 5 & 6 Ed. 6. c. 20
11 East. 165. 21 Jac. 1. c. 17. s. 2. 12 Car. 2.

(2) 37 Hen. 8. c. 8. repealing c. 13. s. 2.

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The statute avoids *all* bonds, contracts, and assurances upon which its operation attaches; and a judgment entered upon a warrant of attorney tainted with usury, may be set aside on application to the Court. And as the whole security is contaminated, the Court will set aside the judgment, without compelling the defendant to repay the principal and interest (1). To make a contract usurious, there must be an unlawful intent; and therefore an excessive charge of interest, arising from an error in computation, will not vitiate the agreement, especially where the mistake is attributable to the scrivener or agent (2). 2dly, To constitute usury, there must either be a direct loan, and a taking of or agreement to take more than legal interest for the forbearance of repayment; or there must be some device contrived for the purpose of concealing or evading the appearance of a loan, when in truth there was one. An exorbitant discount paid to the acceptor of a bill before it becomes due, in order to induce him then to take it up, is not usurious (3); nor is usury committed even where a loan takes place, provided the charge alleged to be excessive is referable to the trouble, expence, and inconvenience incurred by the lender of the money, and not to a charge of interest (4); and a banker may always deduct his usual commission and exchange on bills or notes, over and above the legal interest and discount (5). But where suspicious circumstances appear, it will be the province of a jury to consider, under the direction of the court, whether the remuneration was not made as a mere cloak

(1) Roberts v. Goff, 4 Barn. & Ald. 92.

(2) Nevison v. Whitley, Cro. Car. 501. and see Buckler v. Mil-lard, 2 Vent. 107. Booth v. Cook, 2 Freen, 264. Lloyd v. Williams, 3 Wils. 261. 2 Bla. Rep. 792. Glasfurd v. Laing, 1 Campb. 149.

(3) Barclay v. Walmsley, 4 East, 55. 5 Esp. 11. Mathews v. Grif-fiths, Peake, 200. 1 B. & P. 153 n. Hammett v. Yea, 1 B. & P. 144. and see 4 Ves. 678. 4 Taunt. 810.

(4) Marsh v. Martindale, 3 Bos. & Pul. 154. Per Eyre, Ch. J., in Hammett v. Yea, 1 Bos. & Pul. 153. Barclay v. Walmsley, 4 East, 55. Masterman v. Courie, 3 Camp. N. P. C. 488. Carstairs v. Stein, 4 Maule & S. 192. Curtis v. Live-sey, H. T. 1790. ed. 196. Barnes

v. Corledge, Noy, 41. Yelv. 30. Noy, 171. Palmer v. Baker, 1 Maule & S. 56. Scott v. Brest, 2 Term Rep. 238. Exparte Ben-son, 1 Mad. Rep. 112. Id. 511. Harris v. Boston, 2 Camp. 348. Palmer v. Baker, 1 M. & S. 56. Brooke v. Middleton, 1 Camp. 445. and see Kent v. Lowen, 1 Camp. 177. Baynes v. Fry, 15 Ves. 120. And as to charging compound interest, see Chitty on Bills, 5 ed. 110. Calcot. v. Wal-ker, 2 Amst. Rep. 495. Bruce v. Hunter, 3 Camp. 467. Moore v. Voughton, 1 Stark. 487. and see Palmer v. Baker, 1 M. & S. 57.

(5) Winch v. Fenn, 2 Term Rep. 52. Exp. Henson, 1 Mad. 112. Barclay v. Walmsley, 4 East, 55. and cases in the above note.

for usury (1). Where the contract is substantially for a purchase and not a loan, an exorbitancy in the price will not constitute usury, and the purchase of an annuity at ever so cheap a rate, will not *prima facie* be usurious. But if the annuity be an annuity for years, and on calculation it appears that more than the principal and legal interest is to be received, it will be usurious (2). And however regular the agreement may be on the face of it, yet if it appear to be colourably framed to evade the statute, and obtain more than £5 per cent. on a loan, the contract will be void. Where a builder, having taken ground on a building lease, at the ground rent of £108, assigned over his lease to A. for a sum considerably exceeding the then value of the premises, and at the same time took a lease from A. at an increased rent of £395, and containing the same covenants for building (3) as the original lease, together with a stipulation that he should be allowed to repurchase the lease at the same sum for which it was assigned by him to A., it was held under these circumstances that it was properly left to the jury, to say whether this was a purchase or a usurious loan; the jury having found it to be the latter, the court refused to disturb the verdict (4). It frequently happens that the party advancing the loan makes it partly in money and the remainder in goods, *prima facie* there is nothing illegal in this; but if the goods be much overrated in their value, or the goods be forced on the borrower, it will be a question whether the contract be not usurious, and the lender will be bound to prove the sufficiency of the value of the goods (5). Where a loan is made returnable again on a certain day, on payment of a sum exceeding the legal interest on default thereof, the court will sometimes consider the sum payable as a penalty, and not an usurious contract (6). In all these cases the courts will look attentively to the intention of the parties, and indeed such intention must always be the criterion from which usury can

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(1) Carstairs v. Stein, 4 Maule & S. 192. and cases there cited.

(2) Marsh v. Martindale, 3 Bos. & Pul. 151. Per Bayley, J., in Doe v. Gooch, 3 B. & A. 666. and see Smedley v. Roberts, 2 Camp. 607. Chesterfield v. Jansen, 2 Bla. Rep. 864.

(3) Vide Rex v. Drury, 2 Lev. 7. 3 B. & A. 667, 8.

(4) Doe v. Gooch, 3 Barn. & Ald. 664. See Holt, C. N. P. 295.

4 Campb. 1. 2 Lev. 7. Chesterfield v. Jansen, 2 Bla. Rep. 864.

(5) Lowe v. Waller, 2 Dougl. 735. Pratt v. Willey, 1 Esp. 40. Davis v. Hardacre, 2 Camp. 375. Coombe v. Miles, 2 Camp. 553. Jones v. Davison, Holt, C. N. P. 256. and see Doe, Grimes v. Gooch, 3 B. & A. 664.

(6) Wells v. Girling, 1 Taunt. B. 449.

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be established. So, as to constitute usury it is necessary that there should be a loan or forbearance, where the principal is put in hazard, and the agreement contemplates that it may possibly never be returned at all, it has been considered, that there is no such lending or forbearance as will make the contract usurious. As where a Greenland fisherman, in consideration of the advance of £100 to victual his ship for Newfoundland, engaged to return so many thousand fishes, if the vessel came back in safety, but if it did not return, the principal was not to be repaid; the contract was holden binding upon him, although at the rate at which the fishes were valued by the agreement, the creditor, on the event of the ship's returning, actually received more than legal interest; here the principal was put in jeopardy, and whether the creditor was to receive any thing for his advance or not, depended upon the success or failure of a hazardous voyage (1). This case indeed seems to have been peculiarly free from objection, under the act of parliament, for one of the principal objects of the statute was to induce monied persons to embark in commercial speculations; which it was conceived they would be unwilling to engage in, if they had the power of making large profits of their capital by employing it in loans at home. If the contingency which the agreement contemplates is extremely slight, or such as in all human probability is nearly allied to a positive certainty; or if from the formation of the contract, it appears to have been only a device to evade the statute; if the casualty goes to the interest only, and not to the principal, the bargain will be usurious (2). 3dly, To render a contract void on the ground of usury, it must be tainted with it in its inception, and any subsequent corrupt bargain will not invalidate it (3). The usury must make a part of the contract. Thus, if a security be given for the principal and legal interest, and the obligee afterwards pay the obligor more than legal interest, it will not invalidate the original security, though perhaps the party himself might be sued for the penalty of usury. The security or contract being void in its commencement, it is void in all its stages, and cannot be enforced in the hands of a party who receives or takes it up ignorant of the usury; and till of late, bills of ex-

(1) *Roberts v. Treymayne*, per Dodderidge. Cro. Jac. 508. 3 Wils. 395. 95. *Daniel v. Cartony*, 1 Esp. N. P. C. 274. S. P. See *Young v. Wright*, 1 Camp. 139. *Carldwell v. Martin*, 9 East, 191. 1 Saund.

(2) *Id. ibid.*

(3) See *Parr v. Eliason*, 1 East, 295.

change and promissory notes, originally given for usurious considerations, even in the hands of a *bonâ fide* indorsee, were considered void (1). But now, by 58 Geo. 3. c. 93, it is enacted, "that no bill of exchange or promissory note that shall be made or drawn after the passing of this act, shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, *actual notice* that such bill of exchange or promissory note had been originally given for an usurious consideration, or upon an usurious contract." By the late decision in *Edward v. Dick* (2), it may be concluded that a drawer after having parted with a bill for a valuable consideration to a party who had notice, cannot afterwards set up as a defence an antecedent usurious contract between himself and the acceptor. Where a substituted security is given for a security contaminated with usury, it is void between the original parties to the first contract, or their personal representatives (3), but not when the substituted security is given to an innocent third person (4); and even between the original parties or their personal representatives, if the substituted security be given instead of one originally usurious, but which on the substitution of the fresh security is rendered valid by the deduction of the usurious payment or loan, it is valid (5). Taking usurious interest on a *bonâ fide* debt does not destroy the original debt. (6)

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Another species of illegality introduced by statute, the operation of which frequently invalidates contracts, is that of stock-jobbing. This is a species of gambling by making contracts outwardly framed for the sale or purchase of stock, but in reality intended only to enable the respective parties to gain or lose by the contingent fluctuations in the market, without any stock being actually sold or transferred (7). The offence is defined by the statute 7 Geo. 2. c. 8. in which such offences are

(1) *Lowe v. Waller*, Dougl. 735. *Lowes v. Mazzaredo*, 1 Stark. 385.

(2) 4 Barn. & Ald. 215.

(3) *Cuthbert v. Haley*, 8 T. R. 392. 394. *Preston v. Jackson*, 2 Stark. 237.

(4) *Cuthbert v. Haley*, 8 T. R. 390. *Dagnal v. Wylie*, 2 Campb. 33.

(5) *Wright v. Wheeler*, 1 Campb. 165 n. *Barnes v. Hedley*, contra 1 Camp. 157. 2 Taunt. 184. See *Preston v. Jackson*, 2 Stark. 237.

(6) *Gray v. Fowler*, 1 H. B. 462. *Fitzroy v. Gwillim*, 1 T. R. 153. And see 2 Ves. 567. 2 Bro. Ch. Ca. 649. 1 Saund. by Serj. Williams, 295.

(7) Arg. 8 T. R. 163.

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described as utterly destructive of the public good, as tending to the ruin of trade, and the discouragement of all industry. The statute enacts (1), that all contracts upon which any premium or consideration for a premium shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock or other public securities; and all wagers or contracts in the nature of wagers, and all contracts in the nature of putts and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be null and void; and all premiums or sums paid or delivered upon such contracts shall be restored and may be recovered back, together with double costs, in an action of debt in a succinct form, founded on the statute. A £500 penalty is incurred by any party entering into such a contract, except in the case of one who, having paid money under such a contract, afterwards sues to recover it back; or having received money under such a contract, afterwards tenders it back again in the presence of witnesses; or one who having been guilty of an infringement of the law, afterwards discovers it in a court of equity (2). By the fifth section it is enacted, that no money or other consideration shall be voluntarily given or received for compounding, &c. any difference for the not delivering, transferring, having, or receiving any public or joint stock or other public securities, or for the not performing of any contract or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered shall be actually so done; and the money, or other consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid. The same section further proceeds to impose the penalty of £100 upon persons acting contrary thereto. By the eighth section £500 penalty is imposed on persons buying or selling stock of which they are not actually possessed at the time of the contract; and all contracts relating to such buying or selling are declared void. By the eleventh section it is provided, that the act shall not prevent persons from lending money on public stocks, or the re-delivery thereof, on payment of the money lent. The words of this statute are com-

(1) 7 Geo. 2. c. 8. made per-
petual by 10 Geo. 2. c. 8.

(2) 7 Geo. 2. c. 8. s. 4.

prehensive, but care must be taken that in attempting to prevent the mischiefs which it contemplated, we do not give it an undue operation, and by an unnecessary rigour of construction vitiate agreements which in themselves are just and honourable. It is clear from the concluding section that the act does not prohibit a loan of stock to be replaced by the borrower on fair and reasonable terms; and therefore, in the case of *Saunders v. Kentish*, where the plaintiff, being possessed of £3,000, 4 per cent. stock, empowered the defendant to sell the same for his own benefit, in consideration of which the defendant agreed to transfer at the next opening £3,000. 4 per cent. into the plaintiff's name, it was held that this was not a case prohibited by the 7 Geo. 2. c. 8. s. 8., but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer (1). So where a defendant, on an action being brought against him, appeared to be indebted to the plaintiff in £486 4s. 6d. and the plaintiff being desirous of investing his money in the funds, in which mode the debt in question would have produced £908 16s. 7d. stock, agreed to give still further time to his debtor, in consideration of his having the £908 16s. 7d. stock secured to him, with the interest and dividend in the meantime, and took a bond from the defendant accordingly, the bond was holden valid (2). So where a debtor, who owed the sum of £1,000, agreed to transfer within a given time, to his creditor, £100 per annum long annuities at the then price, and in the meantime pay his creditor the dividends, and that the debt of £1,000 should constitute part of the purchase money, the agreement was holden valid (3). Selling out omnium on the terms of its being replaced in stock, is not illegal within the meaning of the act (4). But it would be foreign to our present purpose to enter into a discussion of the several penal clauses of the statute, or to set forth the decisions respecting them. Those cases only which apply to agreements will here demand attention. As to which it is observable that all agreements which counteract the true spirit and meaning of these provisions which are contaminated with and expressly arise out of transactions so made illegal, whether they

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(1) *Saunders v. Kentish*, 8 T. R. 162. See 1 Madd. V. C. Rep. 511.

(2) *Maddock v. Rumball*, 8 East, 304. See also *Clark v. Giraud*,

1 Mad. Rep. 511.

(3) *Clark v. Giraud*, 1 Madd. Rep. 511.

(4) 1 Stark. 496.

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are or are not in express terms prohibited by the legislature, are invalid. Thus money lent for the express purpose of settling stockjobbing differences, and applied by the borrower accordingly, cannot be recovered back again (1). If two partners engage in a stockjobbing transaction, and one of them, either with or without the consent of the other, pays the whole share of the differences to the broker, the party so paying the money has no remedy for contribution (2). It is clear that a bill of exchange given on account of a stockjobbing transaction cannot be enforced; and therefore where A., being employed as a broker for B. in stockjobbing transactions, paid the difference for him, and on a dispute arising between them respecting the amount of A.'s demand, the matter was referred to C., who awarded £306 to be due, on which A. drew on B. for £100, and indorsed the bill to C. after B. had accepted it, it was held that C. could not recover, for he claimed in privity with the delinquent party, and with knowledge of the illegality (3); and a third person receiving the bill after it becomes due, or with notice, is in the same situation with respect to illegality as one of the immediate parties. But a *bonâ fide* holder of a bill of exchange or promissory note may recover, although the instrument in its concoction was illegal under the stockjobbing act. (4)

Gaming.

Another species of illegality affecting contracts, arises from the statutes 16 Car. 2. c. 7. 9 Ann. c. 14. against *gaming*. The statute Car. 2. enacts, "that if any person shall play at any of the games mentioned in the second section, namely, cards, dice, tables, tennis bowls, trittles, shovel-board, or cock-fighting, horse-races, dog-matches, foot-races, or other pastimes or games whatsoever (otherwise than with and for ready money), or shall bet on the sides or hands of such as play therent, and shall lose any sum or sums of money, or other thing exceeding £100, at any time or meeting, upon ticket or credit, or otherwise, and

(1) Cannan v. Bryce, 3 Barn. & Ald. 179.

(2) Booth v. Hodgson, 6 Term Rep. 405. Aubert v. Maze, 2 Bos. & Pul. 371. Cannan v. Bryce, 3 Barn. & Ald. 183. Webb v. Brooke, 3 Taunt. 12. Exparte Mather, 3 Ves. 373. Exparte Daniels, 14 Ves. 192. Ottley v. Brown, 1 Ball & Beal. 366.

Lightfoot v. Tenant, 1 Bos. & Pul. 554. Langton v. Hughes, 1 Maule & S. 594. Overruling the decisions of Faikney v. Reynolds, 4 Burr. 2069. Petrie v. Hannay, 3 Term Rep. 418.

(3) Steers v. Lashley, 6 T. R. 61.

(4) See Edwards v. Dick, 4 B. & A. 215.

shall not pay down the same at the time of the loss, the value lost shall not be recovered; but all contracts for the same, judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities for the same, shall be void, and the winner forfeit treble the value, in addition to the sum of £100; half thereof to the king, and half to the informer; to be recovered within one year after the offence." And further, by the statute 9 Ann., "all notes, bills, bonds, judgments, mortgages, or other securities or conveyance whatsoever, given, granted, drawn or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, or lent or advanced at the time and place of such play, to play or bet, shall be utterly frustrate and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in anywise notwithstanding; and where such mortgages, securities, or other conveyances shall be of lands, tenements, or hereditaments, or shall be such as encumber or affect the same, such mortgages, securities, or other conveyances shall enure and be to and for the sole use and benefit of and shall devolve upon such person or persons as should or might have or be entitled to such lands, tenements, or hereditaments in case the said grantor or grantors thereof, or the person or persons so encumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so entitled after the decease of the person or persons so encumbering the same; and that all grants and conveyances to be made for the presenting of such lands, tenements, and hereditaments from coming to or devolving upon such person or persons hereby intended to enjoy the same aforesaid, shall be deemed fraudulent and void, and of none effect to all intents and purposes. By the second section it is enacted, that any person who at any one sitting loses, either by playing or betting on others who do play, the sum or value of £10, he may recover it back from the winner in an action of debt on that act; and if the loser do not sue in three months, any one else may sue for and recover the same.

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Where a plaintiff, in any court of justice, cannot establish his case in an action *ex contractu*, without grounding it on a transaction illegal under these statutes, he is not entitled to recover. Thus, in a case where the plaintiff had laid a wager with a certain person at a horse-race, in which the defendant afterwards agreed to participate on the plaintiff's side to the extent of 10 guineas; and on the wager being won by the plaintiff, the defendant prevailed upon the plaintiff to advance him the 10 guineas, saying, that he was about to set off immediately on a journey, and that the plaintiff could reimburse himself by receiving the whole stakes, as well his own as the defendant's share from the opposite party; but the opposite party soon afterwards died insolvent, and the plaintiff never could recompence himself, it was held that he could not recover from the defendant, for his claim was grounded on an illegal transaction (1). So a plaintiff who, by the defendant's authority, lays illegal bets in the defendant's name, and losing, pays them, without an express direction to do so, cannot recover back the money so paid (2). But as the playing with cards and dice, and other species of gaming, are not prohibited by the common law, and as the statute of Ann only makes it illegal to win above £10 at one sitting, money fairly won at play, if under the amount of £10, is recoverable in an action of assumpsit (3). And an action lies on a wager on a horse-race, if neither of the sums betted by the parties amounts to £10, and the race itself is run for the sum of £50 or upwards (4). The party losing money at play cannot recover it back in an action at common law, but must found his remedy expressly on the statute (5); which remedy has been held to lie for the assignees of a bankrupt, though not, as it is said, for executors (6), and being *ex contractu*, subjects the defendant to be held to bail (7), and is liable to the plea in abatement of a nonjoinder of the proper defendants (8). But the section of the statute of Ann, which invalidates gaming securities, has been holden not to extend to unwritten contracts (9); and upon this ground, a loan of

(1) *Simpson v. Bloss*, 2 Marsh S. P. Rep. 542.

(2) *Clayton v. Dilly*, 4 Taunt. 165.

(3) *Bulling v. Frost*, 1 Esp. 235.

(4) *M'Allester v. Haden*, 2 Campb. 438.

(5) *Thistlewood v. Cracroft & another*, 1 M. & S. 500. *Vaughan v. Whitcomb*, 2 New. Rep. 413.

(6) *Brandon v. Pate*, 2 Hen. Bla. 308.

See also 2 Ves. jun., 514.

(7) *Turner v. Warren*, 2 Stra.

1079.

(8) *Bristow v. James*, 7 T. R. 257.

(9) 2 Burr. 1077. 2 Stra. 1249.

V. 1 Salk. 345. 1 Ld. Raym. 452. Com. Rep. 4.

money to game with has been held valid, where no written security was taken for the repayment, even in a case where the plaintiff and defendant were themselves playing together, and the plaintiff, having won all the defendant's ready money, lent him, at several times, successive sums of 10 guineas, and won them from him, till the defendant had borrowed 120 guineas (1). It has also been said, that where above £10, and less than £100, is lost at play, but is not paid at the time, and no written security is taken for the repayment, the winner may recover back the money, and the loser has no remedy under the statute (2); for the first section of the 9 Ann. only extends to written securities, and the second section contemplates those cases only where the money is paid at the time of losing. The reason for not extending the terms of the statute of Ann. to parol contracts has been suggested to be, that the legislature might perhaps think it unnecessary to prohibit such cases as these, where the credit was not likely to run high; and in a case where money was paid by a third person, at the request of the loser of a bet at a horse-race, to the winner, the action for money paid was held sustainable, on the ground that the statute does not avoid the contract in such a case, but only written securities (3). But the authority of this decision seems questionable; and it seems difficult to account for the omission of parol contracts in the first section of the statute, except by concluding that the legislature considered that such practices must be effectually suppressed by its being declared an indictable offence in the winner to acquire property so illegally, and by the loser's being declared entitled to recover back the money paid. If the question should now come before the Courts at Westminster, after the frequent and able discussion which has lately taken place, on the subject of illegal contracts, there can be but little doubt that a party so lending his aid to an illegal transaction, would be holden not to be entitled to recover (4). A bill of exchange or written security, given on account of a gaming transaction, is invalid by the very terms of the statute; and even the *bona fide* holder of a negotiable instrument cannot recover against the acceptor of a bill, or maker of a promissory note, given in consideration of a gaming debt; but a *bona fide* holder may recover against the

(1) *Barjean v. Walmsley*, 2 Stra. 1249. See last note, *sed quære*. (3) *Alcenbrook v. Hall*, 2 Wils. 309.
(2) *Andr.* 71, 2. Case cited by (4) *Bensley v. Bignold*, 5 Barn. Chapple, J., *sed quære*. & Ald.

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drawer of the bill (1), or against the payee and indorser of the promissory note. (2) And it seems that the court will not interfere in a summary way to set aside a warrant of attorney, and judgment entered up thereupon, in favour of a *bona fide* holder of bills of exchange, where the acceptor has renewed them when due, and given a warrant of attorney without making objection. (3) Where a bond was given by the loser of money at play, to an innocent third person, to secure a debt due to him from the winner, the bond was holden valid. (4) By the statute against illegal gaming in lotteries, it is made unlawful to promise or agree to pay any sums of money, or to deliver goods, or do or forbear doing any thing for the benefit of any persons, whether with or without consideration, on any event or contingency in games or lotteries, commonly called Little Goes, &c., or to publish any proposal for such purposes, and the offender forfeits £100. (5)

The "buying or selling of public offices," is rendered illegal by the statute 5 & 6 Edw. 6. c. 16. s. 2. & 3., by which it is declared, that all bargains, sales, promises, bonds, agreements, covenants, and assurances for money or other profit, in consideration of or relating to appointments touching the administration of justice, or the collection of the revenue, &c., or for the deputation thereof, shall be void. The provisions of this statute have been since extended to Scotland and Ireland, and to all offices in the gift of the crown (6); all commissions, civil, naval, and military, and all places and employments in the departments and offices there particularly mentioned. The 7th section of the latter act contains a proviso that it shall not extend to any purchase or sale, or agreement for the purchase or sale of certain offices in the palace, or commissions in the army at the regulated prices, and authorized regimental agents acting without fee. And the statute does not prohibit a deputation to any office where it is lawful to appoint a deputy, or any agreement, &c. lawfully made in respect of any

(1) Edwards v. Dick, 4 Barn. & Ald. 212.

(2) Per Cur. Bowyer v. Bampton, 2 Stra. 1155.

(3) George v. Stanley, 4 Taunt. 683.

(4) 2 Mod. 279.

(5) 42 Geo. 3. c. 119. s. 5.

(6) See 49 Geo. 3. c. 126. 1

Stark. Rep. 92.; see also as to what is to be considered an office intended under the statute 5 & 6 Ed. 6. Woodward v. Fox, 3 Lev. 289. Layng v. Paine, Willes, 571. S. P. Godolphin v. Tudor, Salk. 468. Browning v. Halford, Freem. 19. 1 H. Bla. 322.

allowance, salary, or payment, made or agreed to be made by or to such principal or deputy respectively out of the fees or profits of such office. The 11th section also contains an exception as to annual payments out of the fees to any person formerly holding the office, provided such reservation, and the circumstances under which it was permitted, is stated in the instrument of appointment of the person succeeding to the office. In a recent case, an assignment to trustees of all the emoluments and profits to arise and become due to the assignor, as clerk of the peace (after deducting the salary or allowance of his deputy for the time being), upon trust to pay certain debts of the grantor, and to pay over the residue, was holden void (1). Here the office itself was not saleable; and an assignment of the profits attached to it, and intended for its support and dignity, is equally against public policy; nor is the reservation of the allowance for the deputy sufficient. The half-pay of an officer in the army cannot be assigned. But an assignment of all the offices of trust, commissions, &c. which the assignor may acquire, with a view to indemnify a person who had paid money for him, is good with respect to an office that may be legally assigned; as for instance, that of private secretary to a nobleman, Lord Holderness (2). But the act did not extend to prohibit an agreement by a principal to pay his deputy a proportion, as for instance, half of the profits of the office; for here the profits still belong to the principal, and must be sued for in his name, although a share is to be allowed out of them to the deputy for his trouble (3). But the reservation must be to pay out of the profits; and where a bond was given, with a condition to reserve a sum certain, without contingency, the bond was held void. (4)

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V. Pursuing our enquiry upon the parts of the definition of a contract, we have now to consider the *subject matter* of the contract, which we may remember is “to perform some act which the law does not forbid, or to omit some act the performance of which the law does not enjoin.” (5) Subject to the restrictions, that the contract be not against the policy of the common law, or the provisions of the statute law, which we

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(1) Palmer and another, v. Bate and others, 2 Brod. & Bing. 673.

(2) Harrington v. Klopprogge, 2 Brod. & Bing. 678.

(3) Per Cur. in Godolphin v.

Tudor, Salk. 468. Gulliford v. De Cardonell, Salk. 466.

(4) See cases last note, Parsons v. Thompson, 1 H. Bl. 322.

(5) Ante, 3.

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have before considered when examining the legality of considerations, there is no limit to the stipulations that may be made between individuals. It may be for the past, the present, or the future, as that such a thing has or has not been done (1), that such a thing does or does not exist at the time of the bargain, as in the case of a warranty, or that something shall or shall not be thereafter done. (2) It would be endless to attempt to enumerate all the various bargains that may be entered into between individuals. The principal mercantile contracts will hereafter be particularly discussed. Any legal act, and which it may be reasonable to perform, may be the subject matter of contract, but no right can be created, or obligation be incurred, from a contract to perform an act *naturally impossible*, it being a maxim *lex neminem cogit ad vaná, inutilia, aut impossibilia* (3); and therefore were a person absurd enough to covenant with another to build him a large house in a day, or to go to Rome in the same time, or any such impossibility, the contract would be void, and the party undertaking to accomplish it would not be subject to any action even for damages accruing by reason of nonperformance. (4) But the matter stipulated to be done is only considered in the eye of the law impossible, when at the time of making the stipulation it was obvious that it could not by any means take effect, for if it be only in a high degree improbable, or only beyond the power of the obligor in particular to effect, it is not then considered as impossible, and therefore the contract may be enforced. (5) Therefore an action lies for the breach of a contract in consideration of £5, to deliver two rye corns next Monday, and double every succeeding Monday yearly (6); or on a contract to pay for a horse a barley corn a nail for every nail in the horses shoes, and double every nail, which came to 500 quarters of barley (7); though it was urged in the first case, that the agreement appeared on the face of it to be impossible, the rye to be delivered amounting to such a quantity as all the rye in the world was not so much, and being impossible was void, and the defendant not bound to

(1) Com. Dig. Covenant, A. 1. 163. 6 T. R. 719. 2 Bla. Com. Plowd. 308 a. 340. 1 Co. 98 a. 2 Ld. Raym.

(2) Com. Dig. Covenant, A. 1 1164.
F. N. B. 145 A.

(6) Thornborow v. Whitaker, 2 Ld. Raym. 1164.

(3) Co. Lit. 179 a. 197 b. 206 a.

(4) 1 Pow. 140. 160. 106.

(7) James v. Morgan, 1 Lev. 111.

(5) Co. Lit. 206. n. l. 1 Fonbl.

perform it; and Holt C. J. said, suppose A. for money paid him by B. will undertake to do an impossible thing, shall not an action lie against him for not performing it, and shall he not answer for damages; and as to the impossibility, the court said it was only impossible with respect to the defendant's ability, which was not such an impossibility as would make the contract void. (1) In cases however of this nature the jury are not bound to give the full sum or quantity provided for by the contract, and in the last mentioned case the judge on the trial directed the jury to give the plaintiff only the value of the horse. (2) But when in a lease, a tenant has covenanted to pay £50 per acre per annum as an increased rent, in case of doing or omitting to do certain acts, the jury have no discretion as to the amount of the damages, and must give the £50 per acre as increased rent, on proof of the breaches of covenant. (3) If the thing to be done be possible at the time of making the contract, and afterwards become impossible by the act of God, the act of law of this country, or the act of the obligee himself, in that case the performance of the contract is excused (4). But in general it is incumbent on the party contracting expressly to provide for all contingencies, the rule being that when the law creates a duty or charge, and the party is disabled to perform it without any default in him, and have no remedy over, there the law will excuse him; but when the party by his *own contract* creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it in the contract (5); and therefore where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her until the further order of council; it was held that such embargo only

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(1) 2 Ld. Raym. 1165.

(2) 1 Lev. 111.

(3) Farrant v. Olmius, 3 Barn. & Ald. 692.

(4) 2 Bla. Com. 341. 3 M. & S. 270. 2 Moore's Rep. 358. Sir W. Jones, 301. 3 Bos. & Pul. 301.

(5) Alleyn, 27. Hadley v. Clarke, per Laurence, J. 8 T. R. 267. Vin. Ab. Rent, L. 1. Noy, 70. 3 Anstr. 687. 5 T. R. 217, 8. Dyer, 33. Com. Dig. Action of

Assump. G. 215. Rol. Abr. Conditions, 451. Jones, Bailment, 65. 68. 115, 6. 1 Esp. 367. Gilb. L. and E. 181. 6 T. R. 719. 750. Da Costa v. Davis, 1 Bos. & Pul. 242. Prunty v. Taylor, 2 Taunt. 150. Shubrick v. Salmon, 3 Burr. 1637. Atkinson v. Ritchie, 10 East, 530. Barker v. Hodgson, 3 Maule & S. 267. Fontery v. Hubbard, 3 Bos. & Pul. 291.

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suspended but did not dissolve the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the nonperformance of their contract (1). So the charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communicated without danger of contracting and communicating the disorder. (2) But by exception or proviso a party may in these cases protect himself from liability to perform the act, and in that case both parties may avail themselves of the benefit of the exception; and therefore if a British merchant charter a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charterparty contains the usual exception against the restraint of princes, and the ship be prevented from reaching St. Michael's in the fruit season, by an embargo laid on Swedish vessels by the British government, in consequence of an act of the Swedish government, the Swedish owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant (3); and in general where the performance of a covenant has been rendered unlawful by the government of this country, the contract would be dissolved on both sides (4). If a statute direct that a contract to do any particular act shall be void, and an entire indivisible agreement be entered into to do such act, and also a lawful act, no part of such agreement is valid (5); as a verbal contract to pay the debt of another and do some other act. (6) But where one of the things stipulated to be done is repugnant to the common law, which contains no express directions affecting the security, the stipulation is valid as to that part which is legal, if the contract be not so entire and its parts so dependant on each other as to be incapable of being observed with propriety. (7) In this respect we may observe a material distinction between the illegality in a part of a

(1) *Hadley v. Clark and others*, 8 T. R. 259.

(2) *Barker v. Hodgson*, 3 M. & S. 267.

(3) 3 Bos. & Pul. 291.

(4) 3 M. & S. 270. 10 East, 545.

(5) Hob. 14. 7 T. R. 201. 1 Saund. 66. n. 1. 2 Vent. 223.

(6) 7 T. R. 201.

(7) *Hobart*, 14. 1 Saund. 66. n. 1. 4 M. & S. 66. 5 Taunt. 727. *Moore*, 856. S. C. 2 Wils. 351. 348. Co. Lit. 206 b. n. 1. 2 Burr. 1082. *Willes*. 571. n. b.

consideration, and in a part of a stipulation, for in the former case the law will not give effect to the contract founded on a consideration in part illegal, but in the latter it will enforce performance of so much of the contract as is legal, unless by the express terms of a statute the whole be declared void; and where the statute only avoids the particular stipulation, and not the deed or instrument in which it is contained, as in case of a lessee covenanting to pay the property tax, the rest of the deed will be valid. (1) There must be certainty in most contracts, or they will be inoperative, and at law as well as in equity a fixed price is an essential ingredient in a contract of sale; and if an agreement for sale be according to the valuation of two persons, one chosen by each party, or of an umpire to be appointed by those two in case of disagreement, the contract is not binding. (2)

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VI. We are now led to inquire into the mode or form in which a party may testify his assent to a contract, and this at common law may be effected either by express words in writing or by parol, or it may be implied from the act of the party in co-operation with a legal inference. The observations to be found in the preceding part of this volume, relating the mode in which the assent to a contract may be made, will be found here applicable (3). In point of form no precise words are necessary to constitute an express contract; any form of words or mode of expression in an instrument which clearly evinces an agreement will be effectual for that purpose (4); as if it be agreed between A. and B. by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day (5). So where a lease provided that the tenant during the term should fold his flock of sheep, which he should keep on the demised premises under a penalty if he omitted to do so, it was held *arguendo* that this amounted to a covenant to keep a flock of sheep upon the premises (6). It would be impracticable to enumerate the im-

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(1) 11 East, 165. 4 Taunt. 57. 105. 15 East, 441. 2 Marsh, 97. 1 Powel, 443 to 446. 5 Bro. C. C. 389. 2 Eq. Ca. Ab. 389.

(2) 14 Ves. jun. 401. S. P. point ruled in K. B. A. D. 1821.

(3) Ante 3.

(4) Moor. 135. Bac. Abr. Co-

venant, A. Com. Dig. Covenant, A. 2. and Chanc. Ca. 294. Leon. 326. 1 Burr. 290. Dougl. 766.

(5) Pordage v. Cole, 1 Saund. 319. 1 Lev. 274. T. Raym. 183. S. C.

(6) Webb v. Plummer, 2 Barn. & Ald. 746.

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mense variety of decisions which have taken place in the construction of what will amount to a covenant with reference to the terms used and expressed in a written instrument (1). There are some words which though of themselves they do not import an express covenant, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law, and will as effectually bind the parties as if expressed in the most explicit terms (2); as if A. by indenture "*demise and grant*" lands to B. (3) for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant, and A. is estopped from saying that B. was not in by the lease; so

(1) See in general, Bac. Abr. Covenant, A. Com. Dig. Covenant, E. Duke of St. Albans v. Ellis, 16 East, 352. Selwyn, N. P. 449. 1 Rol. Abr. 518 c. pl. 2. Brownl. 23. S. C. 2 Co. 72. 40 E. 5 b. Cro. Jac. 399. 521. 3 Bulst. 163. Rol. Rep. 359. 2 Rol. Rep. 63. S. C. adjudged. Brice v. Carre, 1 Lev. 47. Giles v. Hooper, Carth. 135. Porter v. Sweetnam, Sty. 406. 431. Bush v. Coles, Carth. 232. Salk. 196. S. C. (as to words "yielding and paying" raising an implied covenant, see 1 Sidf. 447. Webb v. Russell, 3 T. R. 402. 1 Saund. 241 b. n. 5. Selwyn, N. P. 450. n. 7.) Paradine v. Jane, Aleyn. 27. Dyer, 33 a. E. 28 & 29. H. 8. C. B. Monk v. Cooper, E. 13. Go. B. R. Stra. 763. 2 Ld. Raym. 1477. S. C. Beale v. Thompson, C. B. E. 43. Geo. 3. 3 Bos. & Pul. 420. Selw. N. P. 451. n. 8. Atkinson v. Ritchie, K. B. 49 Geo. 3. 10 East, 533. Belfour v. Weston, 1 T. R. 310. S. P. Camden v. Morton in Chanc. E. 4 Geo. 3. MSS. 2 Rep. temp. Lord Chanc. Northington, p. 219. Brown v. Ruilter, in Chanc. 1 June 1764. MSS. Amb. 619. S. C.; but see as to latter decision, Hare v. Groves, 3 Anstr. 687, and Holtzapffel v. Baker, 18 Ves. 115. Pindar v. Ainsley, Mid. Sittings after M. T. 1767. cited by Buller, J. 1 T. R. 312. 1 Selw. N. P.

453. Earl of Chesterfield v. Duke of Bolton, Com. R. 627. Bullock v. Duncit, 6 T. R. 650. S. P. Brecknock Comp. v. Pritchard, 6 T. R. 750. Shubrick v. Salmon, 3 Burr. 1637. 2 Mod. 89. 91. 2 Freem. 3. S. C. Leon. 122. Mod. 113. 3 Keb. 304. Freem. 268. Ld. Raym. 683. 2 Ld. Raym. 1242. 1419. 2 Bla. Rep. 820. Rol. Abr. 519. Hard. 178. Raym. 25. Keb. 103. 118. Sid. 48. S. C. Carth. 64. Comb. 123, 4. Cro. Car. 128, 9. Cro. Eliz. 242. 2 Co. 71. Cro. Jac. 281. Yelv. 206. 1 Brownl. 113. Bulst. 156. 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. 2 Lev. 116. 3 Keb. 454. 3 Keb. 460. Rol. Abr. 517. Cro. Jac. 240. Bulst. 21. Cro. Jac. 399. 521. 3 Bulst. 63. Rol. Rep. 359. 2 Rol. Rep. 63. Poph. 136. Salk. 197. pl. 3. Evelyn v. Raddish, 7 Taunt. 411. 2 Stark. 195. Holmer v. Viner, 1 Esp. 131.

(2) See ante as to implied contracts, Bac. Abr. Covenant, B. Com. Dig. tit. Covenant. Selw. N. P. 457. 48 Ed. 3. 2 b. 1 Rol. Abr. 519. F.

(3) Style v. Hearing, Cro. Jac. 73.; and see Pincombe v. Rudge, Yelv. 139. Earl of Shrewsbury v. Gould, 2 Barn. & Ald. 487. Holder v. Taylor, Hob. 12. 1 Ins. 301 b. Spencer's case, 5 Co. 17 a. 4th resolution.

where a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price for the improvements of their lands and repairs of their houses, it was holden (1) that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises, out of which the lessor could be supplied (1). The provisions of the statute against frauds, requiring some contracts to be in writing and to be signed, will hereafter be considered.

VI. MODES OF
TESTIFYING
THE ASSENT,
AND TIME AND
PLACE OF
MAKING THE
CONTRACT.

We will now consider *the time when and place where* a contract may be made. In general, a deed or other contract may be made on a Sunday. Sales of goods on a Sunday, in the ordinary course of trade, have been considered as absolutely void; but sales which are not in the course of trade ordinarily followed by the seller or his agent, will in general be valid (2); as, where the plaintiff sent his horse to a stable-keeper, who disposed of horses by auction, for the purpose of getting him sold, and the defendant bought the horse by private contract on a Sunday, it being objected that the sale was void, on the ground that it was completed on a Sunday, the court overruled the objection, the stable-keeper not having sold the horse, properly speaking, as a horse-dealer, but by a private contract, and therefore not in the exercise of his ordinary calling. The objection to a contract being entered into on a Sunday does not appear to exist at common law, but arises from the enactment of the 29 Car. 2. c. 7. s. 1., whereby no person whatsoever is allowed to do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day (3). This statute is penal; and it is now fully settled, that if any act is forbidden under a penalty, a contract to perform that act is void (4). And it is to be presumed under this latter doctrine, that even though a contract may have been completed on a Sunday, when it was not in the ordinary course of trade, yet it would be void if completed on that day, by means of publicly

Time and place
of making a
contract.

(1) *Earl of Shrewsbury v. Gould*,
2 Barn. & Ald. 487.

(2) *Drury v. Defontaine*, 1 Taunt.
131.

(3) *Cowper's Rep.* 640.

(4) See *Bensley v. Bignold*, 5

Barn. & Ald. fully establishing
this point; and see Lord Mans-
field's opinion in *Drury v. Defon-
taine*, 1 Taunt. 131. *Carthew*.
252, and ante.

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crying, shewing forth, or exposing to sale the goods; for by the enactment of the same section of the above act, it is declared, that no persons whatsoever shall publicly cry, shew forth, or expose to sale any wares, merchandizes, goods, or chattels whatsoever upon the Lord's day (1). There seems to be no legal objection to a bill of exchange or promissory note bearing date on a Sunday.

**Place where
made.**

Not only the time when, but also the place where a contract is made, may become material as to the effect of a contract itself; as, whether, as we before inquired (2) into, it be a secret sale or a sale in market overt, or whether it be made abroad; in which latter case, if the contract be not binding by the laws of the foreign country in which the contract is made, no obligation thereon can ever be raised by the laws of another country. (3)

**VII. THE CON-
STRUCTION
AND LEGAL
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OF CONTRACTS.**

VII. We have now to take a concise view of the principal rules which govern in the construction and interpretation of contracts.

The construction of contracts is generally the same in equity as at law, only equity will relieve under equitable circumstances from a strict performance (4), and the rules of construction are the same, whether the instrument is simple or under seal (5). It has been observed by a celebrated writer on moral philosophy, that every contract should be interpreted and enforced according to the sense in which the person making it apprehended that the person in whose favor it was made understood it, which mode of interpretation will exclude evasion in cases in which the popular meaning of a phrase, and the strict grammatical signification of words differ, or in general wherever the contracting party endeavours to make his escape through some ambiguity in the expression which he used (6); and therefore where a person

(1) These enactments do not extend to prevent the dressing of meat in families, inns, cook-shops, baking dinners for customers, or victualling houses, nor to crying of milk on a Sunday in the morning and evening. 29 Car. 2. c. 7. s. 3. Rex v. Younger, 5 T. R. 449.

(2) Ante, 2 vol.

(3) Melan v. De Fitzjames, 1

Bos. & Pul. 141. Pedder v. McMaster, 8 T. R. 609. Potter v. Brown, 5 East, 124. Sed vide Imlay v. Ellefsen, 2 East, 255. Tidd. 6 ed. 218.

(4) 3 Ves. 692.

(5) 13 East, 63.

(6) Smith v. Mapleback, 1 T. R. 446. Barker v. Freeman, Loft. 33. Cowp. 600. 1 Brod. & B. 430.

gave a promissory note, acknowledging a debt, but concluding "which I promise *never* to pay," payment was enforced (1); and it has been observed (2), that it is the first general maxim of interpretation, "that it is not allowable to interpret what has no need of interpretation," and that when a deed is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such a deed naturally presents; to go elsewhere in search of conjectures in order to restrict or extend it is but an attempt to elude it, and if this dangerous method were once admitted, every deed might be rendered useless. It seems that on similar principles, our courts, notwithstanding their anxiety to give effect to the intentions of the contracting parties, have laid down as a general rule, that parol evidence cannot be admitted to contradict, add to, or vary the terms of any written instrument, and that all latitude of construction must submit to this restriction, viz. that *the words and language* of the deed bear the sense which is attempted to be put upon them. (3) And this sense must be understood to mean their plain, ordinary, and popular sense, rather than the strict grammatical and etymological one (4); as if a person borrow a horse, he is bound to provide for its keep, unless an agreement be made to the contrary (5). If a man agree with B. for the purchase of twenty barrels of ale, he shall not have the barrels after the ale is spent (6); and this sense must be construed according to the law of the country where the contract was made, and in which it is to be performed, and not according to the law of the country into which either or all of the parties may remove (7); for what is not an obligation

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(1) 2 Atk. 32.; see also post, the cases of bills payable to a fictitious payee.

(2) Vattel, L. of Nat. 224. et vide Powell on Contr. tit. Construction.

(3) Anderson v. Pitcher, 2 Bos. & Pul. 168. id. 73. Hotham v. East Ind. Comp. Dougl. 277. Bromet v. Kensington, 7 T. R. 214. Packhurst v. Smith, Willes, Rep. 332.

(4) 5 Vin. Abr. 510. Cowp. 600. 1 T.R. 703. Plowd. fol. 86. and 169. 1 Powell, 373. Brooke, tit. Contract, 4. 1 Chanc. Rep.

53, 4. Cro. Car. 381. 6 Co. Rep. 61. Pop. 55. 2 Bla. Com. 141. Year Books, 27 H. 8. 19 & 27 b. 35 H. 6. 11 b. 15. 17 a. 4 Camp. 385. Chauraud v. Angerstein, Peake, N. P. C. 43. Vaughan Rep. 169. Com. Dig. Parols, A.

(5) Handford v. Palmer, 2 Brod. & B. 359.

(6) Com. Dig. tit. Agreement, C.

(7) Burrows v. Jemino, 2 Stra. 733. Sel. Ca. 144. S. C. Potter v. Brown, 5 East, 130. Shepherd's Ep. 172.

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in one place, cannot be such in another (1). In the case of bills of exchange, the time of payment is in general to be calculated according to the laws of the country where the bill is made payable (2). And although it has been observed (3) that this is contrary to the reason and nature of the thing, yet other writers entertain a different opinion; and it is said, that a bill of exchange is considered in this respect as having been made at the place where it is payable, according to the maxim *contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*; and that consequently the contract should be construed and regulated according to the laws and usages of that place to which the contracting parties have understood themselves subject, following the other rule in *contractibus veniunt ea quæ sunt moris et consuetudinis in regione in quâ contrahitur* (4). And if the language and terms of a contract appear doubtful in their construction, it may be explained by the common use of those terms in the country where it is made; and provided the general law of the land be not to the contrary (5). In the latter case evidence of usage is not admissible, as in a demise of lands by deed, to commence from Michaelmas day, this must be understood to be from new Michaelmas, since the act of parliament for altering the style; but if there is some reference in the deed to a prior holding from old Michaelmas, to shew what the parties intended by using generally the term Michaelmas day, the general term *Michaelmas* being thus fixed by law to mean new Michaelmas, and nothing appearing in the deed from which a different use of the term can be presumed, no parol evidence can be admitted to explain the term of holding stated in the deed (6); and where corn is sold at a fixed price per bushel, evidence that any other

(1) *Melan v. Fitzjames*, 1 Bos. & Pul. 141. *Talleyrand v. Boulanger*, 3 Ves. 447. *Gienar v. Meyer*, 2 Hen. Bla. 603. *Mostyn v. Fabrijas*, Cowp. 174. *Robinson v. Bland*, Burr. 1077. *Folliott v. Ogden*, 1 Hen. Bla. 123. *Alves v. Hodgson*, 7 T. R. 242. *Da Costa v. Cole*, Skin. 272. *Potter v. Brown*, 5 East, 130. *Johnson v. Machielyne*, 3 Camp. 44.

(2) *Beawes*, pl. 251. Mar. 102. Bayley, 112, 3. Mar. 75. 89 to 92. 101 to 103.

(3) Kyd. 8.

(4) Poth. pl. 155. Bayl. 68.

(5) 5 Vin. Abr. 511. 1 Bla. Rep. 258. 6 T. R. 338. *Powell on Contr.* 1 vol. 376. 407. 1 Stark. 504.

(6) *Doe Spicer v. Lea*, 11 East, 312. In this case the tenant first held from old Michaelmas by parol, then took a lease by deed from Michaelmas, and after the expiration of that lease held on without any new agreement.

than Winchester measure was intended, is not admissible (1). So if money is to be paid by reason of a contract, the terms shall be understood and accepted according to their import where it is to be received; that is, it shall be paid in currency there; and therefore, if a contract be made in London to pay a given sum of money, as £100 at Dublin, the contract will be performed by a tender of £100 Irish currency, for *consuetudo et statuta loci in quem est destinatu solutio respicienda sunt* (2): so if money arising out of an Irish estate be made payable in England, it seems that it must be paid in English money (3). And where the words of a contract, without any direct and express provision to the contrary, have generally, in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or where the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense, there their popular sense will not prevail (4). Indeed all mercantile contracts, such as policies of insurance, charter parties, and others of a like nature, are to be construed conformably to the usage and custom of merchants; and the courts have always endeavoured to adapt the rules of law to the course and method of trade and commerce, in order to promote it, and when new cases have arisen on the mercantile law they consult traders and merchants as to their usage of trade in general, and of the particular trade to which the contract relates (5). Thus where an insurance was on a ship from London to the West Indies, warranted to depart with convoy, the court held that this clause of warranty must be con-

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(1) Shepherd, Epit. 172. 4 T.R. 314. See Master, &c. of St. Cross v. Lord Howard De Walden, 6 T. R. 338.

(2) Davis, 28. Kearney and King, Barn. & Ald.

(3) 2 P. Wms. 88. Ibid. 696.; and see Sir John Champant v. Lord Ranelagh, Prec. Chan. 128. Brice v. East Ind. Comp. 1 P. Wms. 396.

(4) Id. ibid. et per Lord Ellenborough, 4 East, 135. Comyns, 532. Holt, C. N. P. 98 note. 2 Stark. 226. Webb v. Plummer, 2 Barn. & Ald. 746. Sir W. Bla-

1225. Holt, C. N. R. 197. Wigglesworth v. Dallison, Dougl. 190. 7. 1 Stark. 504.

(5) 1 Ves. 459. 2 Ves. 331. Edie v. East Ind. Comp. 2 Burr. 1216. Chaurand v. Angerstein, Peake, Rep. 43. Cochran v. Retberg, 3 Esp. N. P. C. 121. Uhde v. Walters, 3 Camp. 16. Birch v. Depeyster, 1 Stark. N.P.C. 210. 4 Camp. 385. S. C.; and see Park on Insurance, p. 49. last ed. 101. Gillet v. Mawman, 1 Taunt. 137. Harper v. M'Carthy, 2 New Rep. 258.

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strued according to the usage among merchants; that is, from such place where convoys are to be had, as from the Downs (1). So where the insurance is on goods till landed, and the defence is, that the plaintiff has been guilty of unreasonable delay in landing, the question can only be decided by knowing the usual practice of the trade, with which every underwriter is supposed to be acquainted, whether the practice has been recently or long established (2). And where a practice prevailed of compressing bales of cotton wool by machinery to improve their stowage, the furnishing a cargo of cotton wool in uncompressed bales as they came from the grower, was held not to be a compliance with a contract to load a full and complete cargo. (3)

With respect to the mode of establishing these particular usages in a trade, it has been held that where the general consent of the persons engaged in a trade has established certain general rules for the conduct of that trade, it is not competent for any number of individuals to establish a contrary regulation; so that though they have undoubtedly a right to fix new rules to be followed amongst themselves, yet they cannot thereby take away the benefit of the old rules, as against themselves, from those who have not assented to their new compact; and this rule will hold, though the trade in comparison with some others be itself but of recent establishment (4). Proof of usage, however, will not be allowed to controul or contradict the plain unequivocal language of a policy, or any other instrument, and the courts are generally careful as to the admission of such evidence (5). And where in an action on a policy of insurance, "on the ship till moored at anchor twenty-four hours, and on the goods till discharged and safely landed," evidence having been admitted that by the custom of trade the risk on the goods, as well as on the ship, expired in twenty-four hours, the court of king's bench granted a new suit on that ground,

(1) Lethulier's case, 2 Salk. 443.

(2) Noble v. Kennoway, 1 Dougl. 510. Vallance v. Dewar, 1 Camp. 503.

(3) Benson v. Schneider, 7 Taunt. 272.; and see 1 Stark. 504.

(4) Fennings v. Ld. Grenville, 1 Taunt. 241.

(5) See Anderson v. Pitcher, 2 Bos. & Pul. 168. Lethulier's case, 2 Salk. 443. Lilly v. Ewer, 1 Dougl. 43. Kaines v. Knightly, Skin. 54. referred to in Bates v. Grabham, 2 Salk. 444. but misstated. Weston v. Emes, 1 Taunt. 115. Uhde v. Walters, 3 Campb. 16. Leslie v. Torze, cited 12 East, 583.

and on the new trial the evidence was rejected (1). And an usage of trade cannot be set up to contravene an express contract, therefore where A. agreed to sell to B. a quantity of bacon, which he warranted to be of a particular quality, part of which B. weighed and examined upon delivery at the wharfingers, and paid for the whole by bill at two months, but before the bill became due gave notice to A. that the bacon was not agreeable to the contract, it was held that B. could not give in evidence a custom in the bacon trade that the buyer was bound to reject the contract if dissatisfied therewith at the time of examining the commodity, and that having neglected to do so in the first instance he was excluded from future objections (2). So where by the custom of the country the outgoing tenant was entitled to an allowance for foldage from the incoming tenant, and by a lease it was specified certain payments to be made by the incoming tenant the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage, it was held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage. (3)

And in the expounding of all contracts and agreements, that construction must be made of them which is consonant to the general intent, as it appears in the general context of the instrument or contract: and it is immaterial in what part of the instrument any particular covenant is inserted, as if the vendor of a lease covenant and grant, that *he* has not made or done any former grant or other thing by which the then present grant or assignment may be in any manner impaired, hindered, or frustrated, but that the assignee and his executors, by virtue of the said grant or assignment, may quietly have, hold, and enjoy all and singular the premises, with their appurtenances, during the term to come, without any hindrance or disturbance by him or any other person, the latter words must be taken with reference to the former ones; and it is no breach if the assignee be disturbed by any other person, if it be without the act of the assignor (4). In general, the masculine gender includes the

(1) *Parkinson v. Collier*, Sitt. after Mic. Term, 1797. Park on Ins. 416. Phillips on Evid. 5 ed. 565. and see *Cutter v. Powell*, 6 T. R. 320.

(3) *Webb v. Plummer*, 2 Barn. & Ald. 746.

(2) *Yeats v. Pinn*, Holt, C. N. P. 95. 2 Marsh's Rep. 141. S. C.

(4) 1 Powell, 403. *Broughton v. Cornway*, Dyer, 240. Moore,

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feminine, the word men extending to women also (1). The ex-
ecutors of the parties are included in every contract without
being named, unless from its nature it appear that such was not
the intention of the parties (2); but the heir is not bound
unless expressly named. (3) And if the value of any thing
be expressly stipulated in a contract, the value shall be intended
as things are at the time, when the contract takes effect (4),
unless there have been an improper delay, and then any loss by
variation in the value must be borne by the person by whose
fault that delay has occurred (5). So, general words in a deed
may be restrained by a particular recital therein, and a contract
referring to antecedent proposals adopts and makes them part
of it (6); as, where a release contained in a deed, which recited
that the defendant stood indebted to his creditors in the several
sums set to their respective names, and that they had agreed
to take of defendant fifteen shillings in the pound upon the
whole of their respective debts, whereby the creditors, in con-
sideration of the said fifteen shillings in the pound, paid to them
before executing the release, each and every of them did release
defendant from all manner of actions, debts, claims, and de-
mands in law and equity, which they or any or either of them

58. 2 Bos. & Pul. 13. and see
Rich v. Rich, Cro. Eliz. 43. Jer-
vis v. Peade, id. ib. 615. Dyer,
255. pl. 4. 2 Comyn on Cont.
533. Gainsford v. Griffith, 1
Saund. 60. Bony v. Taylor, 2
Rol. Abr. 253. H. 3. Crookhay
v. Woodward, Hob. 217. Earl of
Shrewsbury v. Gould, 2 Barn. &
Ald. 487. Doe Freeland v. Burt,
1 T. R. 701. Rex v. Master of
Trinity House, 4 Maule & S. 288.
Hassell v. Long, 2 Maule & S.
363. Meed v. Marshall, 1 Brod.
& B. 319. Pownall v. Moores,
5 Barn. & Ald. 416. 5 T. R. 526.
Duke of Northumberland v. Ward,
Errington, 5 T. R. 523. Iggulden
v. May, 7 East, 237. 2 N. R.
449. Rhodes v. Bullard, 7 East,
116. 1 Rol. Abr. Condition, V.
pl. 7. Vaugh. 119. 1 Selwyn,
N. P. 470, and cases there col-
lected. Noble v. King, 1 H. B. 34.

(1) Brooke, tit. Expositia des
Termes.

(2) Hyde v. Skinner, 2 P. Wms.

270. See Bac. Abr. Covenant, and
Com. Dig. tit. Covenant, and cases
there cited. 1 Stark. 13.

(3) Bac. Ab. Heir.

(4) Dyer, 81 b. 82. 9 Ed. 4.
49 a. 11 H. 7. 5 Dyer, 82 b.
n. 71. Speake v. Speake, 1 Vern.
217. 1 Eq. Ca. Ab. 221. pl. 7.

(5) Dyer, 81. b. 2 Vern. 294.

(6) Bac. Abr. Release, K. 2
Rol. Abr. 409. Thorpe v. Thorpe,
Salk. 171. Trevil v. Ingram, 2
Mod. 281. sed quære if any judg-
ment was ever given in latter case,
see 1 Ventr. 314. by the name of
Tothil v. Ingram, and 2 Lev. 210.
by the name of Ingram v. Bray.
Worsley v. Wood, 6 T. R. 710.
2 H. Bla. 574. 1 Saund. 60.
Cage v. Paxlin, 4 Leon. 116.
7 East, 241. Broughton v. Bray.
Moor. 58. 8 East, 89.
Browning v. Wright, 2 Bos. &
Pul. 13. Hind v. Marshall, 1 Brod.
& B. 319. Howell v. Richards,
11 East, 633. Lampon v. Cork,
5 Barn. & Ald. 606.

had against him, or thereafter could, should, or might have, by reason of the any thing from the beginning of the world to the date of the release, it was held that the release released nothing but the respective debts, and all actions and demands touching them; for the general words of the release had reference to the particular recital, and should be governed by it (1). But a creditor executing a composition deed, without specifying the amount of his demand, thereby binds himself to the extent of his whole claim (2). And again, the previous and concomitant actions of the parties, or other circumstances attending a transaction, may be called in aid to explain the nature of dealings between parties where otherwise an ambiguity hangs over them, provided such evidence does not control the legal sense of the terms of the contract; thus, if two men should bargain for wheat without mentioning the quantity or sort, it would be an imperfect bargain; but if, by their former dealings, it appeared that such a sort and such a quantity was thought of and designed, it would be as good as if it had been actually expressed (3). But the subsequent acts of the contracting parties are inadmissible to explain their original intention (4). The reservation of so many quarters of corn in a hospital renewed lease was construed to mean Winchester measure, notwithstanding the dealings on all former leases had estimated the measure differently (5); and in many cases indeed the ordinary import of words may be restrained, as where an interpretation made in a general sense would involve an absurdity or something obviously not intended by the contracting parties (6), as where

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(1) Payler v. Homersham, 4 Maule & S. 423. 382. T. 1 Lev. 272. 3 Mod. 278. Dobson v. Crew, Cro. Eliz. 705.

(2) Harry v. Wall, 2 Stark. Co. Lit. sec. 335, 6, 7. Tisdale v. Essex, Hob. 34. Cro. Eliz. 213. Knight v. Cole, 1 Eq. Ca. 170. pl. 4. note a. 1 Lev. 101. Hancock v. Field, Cro. Jac. 170. 11. Henn v. Hanson, 1 Lev. 99. 1 Lev. 141. Cro. Eliz. 606. 8 Rep. 153 b. Co. Lit. 291 b. Hetley, 15. Dafforne v. Goodman, 2 Vern. 362. Salk. 154. pl. 2. Cage v. Paxlin. 1 Leon. 116.

(3) 1 Powell, 384. 372, 3. 2 Pow. 41. 41 E. 3. 6. 19. Bacon's Max. 71. Cook v. Booth, Cowp. 819. and see Edgar v. Blich, 1 Stark. 464. Shepherd v. Kain, 5 Barn. & Ald. 240. Cited by Lord Ell., C. J., 7 East, 241. Broughton v. Conway, Moor. 58. Cited by Lord Ell., C. J., in Gale v. Reed, 8 East, 89. Browning v. Wright, 2 Bos. & Pul.

(4) Clifton v. Walmsley, 5 T. R. 564. Cited by Lord Ell., C. J., 7 East, 241. Broughton v. Conway, Moor. 58. Cited by Lord Ell., C. J., in Gale v. Reed, 8 East, 89. Browning v. Wright, 2 Bos. & Pul.

(5) The Master, &c. of St. Cross v. Lord De Walden, 6 T. R. 338. C. J., in Gale v. Reed, 8 East, 89. Browning v. Wright, 2 Bos. & Pul.

(6) 3 Leon, 311. Noy's Max. 14. Bacon's Max. 47. 1 Powell, 382. T. 1 Lev. 272. 3 Mod. 278. Dobson v. Crew, Cro. Eliz. 705. Co. Lit. sec. 335, 6, 7. Tisdale v. Essex, Hob. 34. Cro. Eliz. 213. Knight v. Cole, 1 Eq. Ca. 170. pl. 4. note a. 1 Lev. 101. Hancock v. Field, Cro. Jac. 170. 11. Henn v. Hanson, 1 Lev. 99. 1 Lev. 141. Cro. Eliz. 606. 8 Rep. 153 b. Co. Lit. 291 b. Hetley, 15. Dafforne v. Goodman, 2 Vern. 362. Salk. 154. pl. 2. Cage v. Paxlin. 1 Leon. 116. Cited by Lord Ell., C. J., 7 East, 241. Broughton v. Conway, Moor. 58. Cited by Lord Ell., C. J., in Gale v. Reed, 8 East, 89. Browning v. Wright, 2 Bos. & Pul.

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a man for a past consideration gave a person a promissory note, in the beginning of which it was mentioned to be given for "£20 borrowed and received," but at the latter end were the words "which I promise *never* to pay," it was held, that the payee might recover on it (1); and where an action was brought by an indorsee of a bill of exchange against the acceptor, and he could not prove an indorsement by the payee, evidence was admitted to prove that the payee was a fictitious person, and consequently could not indorse it; and it was adjudged, that as the drawer and acceptor knew of such fact, the bill should as against them operate as a bill payable originally to bearer, and that the holder might recover thereon as such (2). So a covenant to save harmless against all persons, will be understood against a lawful entry or eviction (3). And if a particular construction of a contract would lead to consequences ruinous to the contractor, and such as no rational prudent man could have contemplated, and if an opposite construction may, without doing violence to the terms of the contract, be adopted, the latter shall be preferred (4). And the ordinary import of words may be restrained where something happens that could not be foreseen by the contracting party, but is such as, if it had come into the mind of him who contracted, would have excepted it; as where A. gave a bond to pay £900 to his daughter in case he should have no son living at the time of his decease, and he died, his wife enscint with a son; on a question whether the daughter should have this £900, which, if she had it, would have been more than his son would have had, the court decided she should not have it; for although there was no son living at obligor's decease, so that it was recoverable at law; yet it could not be presumed to be the father's intent, that if a son were born after his decease, the daughter should run away with the estate, and upon this ground, the son was relieved in equity. (5)

13. *Nind v. Narshall*, 1 Brod. & B. 319. *Howell v. Richards*, 11 East, 633. *Iggulden v. May*, 7 East, 237. 2 N. R. 449. Same case in error. *Rhodes v. Bullard*, 7 East, 116. *Goodright dem. Nicholls v. Marsh*, 4 M & S. 30. Dougl. 384.

(1) Cited in *Simpson v. Vaughan*, 2 Atk. 32.

(2) *Gibson v. Nimet*, 1 H. Bla. 569.

(3) *Cro. Eliz.* 213.

(4) *Hassell v. Long*, 2 M. & S. 363.; and see ante, 52. as to cases of imbecility, &c. of the contractor.

(5) *Gibson v. Gibson*, 2 Freem. 223. *Fitz. tit. Subpœna*, 28. *Statham v. Senoncuse*, 1 T. Rep. 100.

An indefinite expression, capable of two significations, should be construed into that which will have some operation rather than that in which it will have none (1); but the courts will always endeavour to construe contracts so that litigation may be avoided (2). When one of two things is to be performed, the option is in the person who is to perform it (3). And where there are several deeds or covenants made at the same time to effect one object, they will be construed as one assurance, so that each shall have its distinct operation to carry on the main design (4). But where two opposite intentions are expressed in a contract, the first in order shall be preferred (5). And where there is an ambiguity in the terms of a contract, which no ordinary modes of interpretation can reach, the interpretation in the last resort must be against the covenantor, being the party with whom the blame of the ambiguity rests, for he might have expressed himself more clearly. Thus, if two tenants in common grant a rent of ten shillings, the grantee shall have ten shillings from each; but if upon a lease they reserve a rent of ten shillings, they shall have only ten shillings between them (6). But in cases where the contract contains something odious or burthen-some to one party more than to the other; as for instance, a bond in a penalty, the interpretation shall be in favour of the party labouring under the disadvantage, though the ambiguity originated with himself (7). Thus, a carrier giving two notices limiting his responsibility is bound by that which is least beneficial to himself (8). So if a man be bound to another, upon condition to pay £10 before the feast day of St. Thomas, and there are two feasts of St. Thomas, the money shall be due on the

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(1) Co. Lit. 42 a. Cowp. 714. 3 Leon. 211. Noy's Max. 14. Bacon's Max. 47. 1 Powell on Cont. 382. 1 Lev. 272.

(2) Smith v. Maplebach, 1 T.R. 446.

(3) Layton v. Pearce, Dougl. 15.

(4) 1 Powell, 410. 2 Vern. 518. Fonblanq. 49.

(5) Cartwright v. Arnatt. 2 Bos. & Pul. 43.

(6) 5 Co. 7 b. Plowden, 140. 161. 171. 289. Co. Lit. 197 a. 297 b. Co. Lit. 147. Rol. Abr. 228. Kelw. 3. Digest, lib. 2.

tit. 14. De pactis, leg. 31. Doe and Webb v. Dixon, 9 East, 15. Flint v. Brandon. 1 New Bos. & Pul. 78. Dann v. Spurrier, 3 Bos. & Pul. 442. Bac. Abr. Covenant, F. Lev. 102. Sid. 151. Keb. 511. S. C. Com. Dig. tit. Covenant. Rubery v. Jervoise, 1 T.R. 234.

(7) Dyer, 17 a. 5 Rep. 22 a. vide exception, 5 Rep. 23 b. 10 Mod. 26. W. Jones, 29. cont. Salk. 170. Elwick v. Cudworth, 1 Lutw. 490. 7 E. 4. 13 b. pl. 4. Fitz. tit. Dett, 81.

(8) Munn v. Baker, 2 Stark. 255.

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last feast and not on the first, for that is most beneficial to the obligor (1). And the courts will not construe ambiguous words against the party who created them, where such a construction would work a wrong to others (2). An indefinite expression shall be understood universally, unless there be otherwise some reason to restrain it (3); as where B. reciting that he was possessed of divers ewes, gave them to A., the gift was held to extend to all the ewes that B. was possessed of (4). But as we have before seen, for the support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined, as a covenant to save harmless against all persons, it will be understood against a lawful entry or eviction (5). And a contract in legal language shall be taken in its most comprehensive signification, so as not only to import what they do in ordinary language, but also to include whatever they signify in that sense which the law has imposed upon them (6); as a covenant in a lease, that lessee shall not carry on the trade of a butcher on the premises, it was held to be broken by the mere selling of raw meat by retail on the premises, although no beasts were there slaughtered. (7)

In Equity.

Courts of *equity*, adverting to the circumstantial object of all contracts, independent of the forms which they assume, give effect to the intent of the parties, by considering their acts as evidence of such a contract or agreement, as will produce what is stipulated. Concerning which, two things are to be considered. *First*, what, in the view of a court of equity, amounts to a contract or agreement. *Secondly*, how it may be proved in equity (8). A contract respecting a thing collateral to the main object itself,

(1) Dyer, 17 a.

(2) Co. Lit. 42. Bro. Exposition des termes, 39.

(3) 1 Powell, 401. 19 H. 6. 42. Hetley, 9. Cooke v. Tounds, 1 Lev. 40.

(4) 1 And. 57.

(5) Cro. Eliz. 213. and see ante. Page v. Paxlin, 1 Leon. 116. cited by Lord Ellenborough, C. J. T. 7 East, 241. Broughton v. Conway, Moore, 58, cited by Lord Ell. Ch. J. in Gale v. Reed, 8 East, 89. Iggulden v. Macy, 7 East, 237. 2 N. R. 449. Browring v.

Wright, 2 Bos. & Pul. 13. Rhodes v. Bullard, 7 East, 116. Nind v. Marshall, 1 Brod. & Bing 319. Howell v. Richards, 11 East, 613.

(6) 1 Powell on Cont. 402. 2 Rol. Abr. 253. E. 25. 35.

(7) 1 Barn. & Ald. 617.; and see Doe on dem. Bish v. Keeling, 1 Maule & S. 95. 4 Campb. 77. Tombs v. Painter, 13 East, 1. Robinson v. Dunmore, 2 Bos. & Pul. 416. Lord Dormer v. Knight, 1 Taunt. 417. Woods v. Dennet, 2 Stark. 89.

(8) Powell, 313.

and expressing the intent of the parties, will be considered in equity as amounting to an agreement, although in form it assume a different character. Thus, where the condition of a *bond* was to convey certain lands, in consideration of a sum of money in hand paid, though the instrument would not have amounted in law to an agreement for a specific performance to convey the land, but merely a stipulation in the alternative to pay the forfeiture of a penalty in case of non-performance, the Master of the Rolls declared that bonds of this nature were always considered in equity, as articles of agreement, and decreed the condition to be specifically performed (1); and the construction will uniformly be the same in equity, although the instrument has become void by some matter *ex post facto*. Thus where A. lent B. £70, and for his security took only a warrant of attorney to confess judgment in ejectment of three closes upon a feigned demise for twenty years, it was held that after the death of B. this was a defective *legal* security, but that it amounted to a *good* agreement in equity to charge the land, and it was decreed accordingly against the heir (2). So an assignment of a chose in action, as a *bond or the like*, which in law is not assignable, is valid *in equity*, whether it be entered into with or without consideration; for a court of equity proceeds upon the principle, that the assignment, although not effectual as such at law, the bond not being assignable in point of interest, amounts nevertheless to a covenant or agreement that the assignee shall receive to his own use, which covenant or agreement that court will carry into specific execution (3). Upon the same principle it is held, that although an award or submission to arbitration is distinguishable from an agreement, inasmuch as the former cannot be supplied by interposition and act of a court of equity, because, generally in those cases the time is conditional, namely, so as a determination be made by such a day; and also therein matters are left to the judgment of the arbitrators, yet an acceptance of any thing under it is evidence in equity of an agreement to perform it. (4)

(1) 2 Ves. 373. Anon. Mosely, v. Watkins, 2 Atk. 97.
37. 10 Mod. 517, 8. 9 Mod. 62.; (3) Ld. Raym. 688. 3 Keb.
and see 19 Ves. 413. 2 Vern. 480. 304. 2 Vern. 540. 595. 3 Chan.
(2) Dale v. Smithwick, 2 Vern. Rep. 40. Chan. Cas. 232. 2 P.
151.; and see Powell on Cont. Wms. 608.
315. 2 Ves. 371, 4. Cannel v. (4) Vide 1 Ves. 445, 450. 3
Buckle, 2 P. Wms. 243. Watkins P. Wms. 188. 2 Vern. 24.

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An agreement may be established in equity by proof of a positive contract in terms, whether it be in writing, or notwithstanding the statute against frauds, by parol agreement in *part performed* (1), or it may be established by proving circumstances, from the nature of which equity will infer an agreement (2), or by proving an instrument from which the same inference may be deducted (3). And where there are plain *indicia* of a further agreement, which must have been entered into concomitant with a power to sell a real estate, but which is not expressed, although without inferring it the instruments produced are unintelligible, and the language of them absurd, a court of equity, to uphold the meaning of the parties in the matter of a trust, will support what is wanted by intendment, and will presume that among the contents of the agreement, of which such strong traces are found, there was those stipulations which are absolutely necessary to give effect to the true and evident meaning of the parties; and a court of equity will from a subsequent transaction raise an agreement accessory to a precedent transaction, where the circumstances warrant such an inference, and it is necessary in order to do justice between the parties. (4)

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VIII. As every contract consists of two reciprocal considerations, it sometimes happens, as we have seen, that one is to be performed before the performance of the other can be compelled. That of which the prior performance is requisite is commonly called a condition precedent, and the other being enforceable only upon the completion of the first, or upon that which is equivalent to completion, is called a condition dependent. There are also contracts wherein the performance of the consideration on each side is concurrent; and where neither party is bound to perform his part of the contract before the other has performed his, but the performance of both the considerations is obligatory on each party at the same time, as in cases of bargains to sell and accept, and pay for goods. In either of these two contracts, an offer or readiness to perform the condition precedent, or the concurrent act to be done, with a refusal or dis-

(1) See Powell on Con. 319. 19 Ves. 446.

(2) Powell, 320. Gilb. Chan. 244. Paskeret v. Serjeant, Finch, 146.

(3) Parks v. Wilson, 10 Mod.

515. 2 Eq. Cas. Ab. 22. pl. 20. et vide 1 Eq. Cas. Ab. 18, 8. Ibid. 393. 5. 9 Mod. 62.

(4) Att. Gen. v. Whorwood, 1 Ves. 534.

charge (1) on the part of the other contracting party, is equivalent to a performance (2); and where the party who is to receive the performance of the contract cannot be found, so that the party who is prepared to perform it has no opportunity of so doing, or making an offer thereof, in order to sue the other party, he must shew his readiness to perform his part of the contract, by proving that he has done every thing as far as in him lies towards the execution of his part of the stipulation (3); and where a party is bound to pay a sum of money, he is bound to seek the payee and pay it if he can find him, and the mere readiness to pay is not sufficient (4), for it is a general rule, that the person to be discharged is bound to do the act which is to discharge him, and not the other party, unless in case of rent, in which it suffices if the tenant be ready to pay on the land on the day of payment. (5)

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Where contracts are mutual and independent, that is, when each was intended to be performed separately, without regard to the question, whether the other ought to have been performed first or not, it will not be necessary for a party who seeks to enforce performance, that he shall have performed his own part previously, for here the plaintiff's agreement to perform is a sufficient consideration (6). But if the contract is to deliver generally, or on request, thus provided, the defendant's act does not render it absolutely unnecessary (7); a special request to deliver must be made before an action can be brought for the non-delivery (8); the demand of delivery of goods sold is suffi-

(1) As to what will amount to the discharge of a contract, see post.

(2) Rawson v. Johnson, 1 East, 203. Morton v. Lamb, 7 T. R. 129. 1 Salk. 112. 171. 2 Bos. & Pul. 447. 1 Ld. Raym. 665. 6 T. R. 570. Lea v. Exlby, Cro. Eliz. 888. 5 East, 107. Com. Rep. 116. 2 Salk. 623. 12 Mod. 529. Wilks v. Atkinson, 1 Marsh, 412. 6 Taunt. 11. S. C. Levy v. Herbert, 1 Moore, 56. 7 Taunt. 318. S. C. 1 Moore, 498. Dougl. 684. Co. Lit. 51 b. 1 Stark. 198. 4 Campb. 375. 8 Taunt. 62.

(3) Id. ibid.

(4) Crauley v. Hillary, 2 Maule

& S. 120. Co. Lit. sec. 340. Soward v. Palmer, 2 Moore, 276. Sed vide 3 Campb. N. P. C. 175. the decision however is doubted to be correct.

(5) Bac. Abr. Rent.

(6) 1 Wilson, 88. Back v. Owen, 5 T. R. 409. Campbell v. Jones, 6 T. R. 570. Acherley v. Vernon, Willes. Rep. 153. 1 Ld. Raym. 664. 1 Salk. 171. Stra. 712. Hob. 106. 2 Taunt. 150.

(7) Amory v. Brodrick, 5 Barn. & Ald. 712.

(8) Back v. Owen, 5 T. R. 409. 10 East, 865. Lowe v. Kirby, Sir T. Jones, 56. Pecke v. Mith-

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cient proof of an averment, that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant, when he himself was not present to have done so if required on the spot (1). Whether one promise be the consideration of another, or whether the performance, and not the mere promise be the consideration, must be gathered from and depends entirely upon the words and nature of the agreement (2), and intention of the parties; and in the case of a continuing consideration, the party seeking to enforce a contract founded thereon must shew that he has suffered the defendant, during the time the contract was in force, to have the benefit of the former's contract.

Of performance
by delivery.

Without reference to the statute of frauds, few sales are perfected in fact by a formal and actual delivery of the thing sold, for such delivery of those bulky articles, which are the subject of a very great proportion of sales amongst merchants, would be exceedingly inconvenient, and indeed many times impossible; a method has therefore been contrived to remedy this inconvenience by substituting a *constructive* for an actual delivery, or in other words a *constructive* rather than an *actual* performance of the contract. Thus, the delivery of the key of a warehouse in which the goods are lodged (3), or of any other symbol as representing the commodity sold (4), or the name of the vendee wrote by his direction on the article sold (5); the making goods up to be delivered, or otherwise separating them from a large quantity of which they formed a part, with a view to delivery (6), the vendee by the consent of the owner, dealing with the property as his own (7), the vendor after the sale receiving warehouse rent for the thing sold, which by the desire of the vendee remains in the vendor's warehouse (8); or the request of

wolde, Id. 85. 3 Leon. 73.
Amory v. Brodrick, 5 Barn. & Ald.
712.

(1) Squier v. Head, 3 Price, 68.

(2) Per Lawrence, J. in Glazebrook v. Woodrow, 8 T. R. 373.
Smith v. Woodhouse, 2 Bos. & Pul. 240. Dougl. 690. 1 T. R. 638. 6 T. R. 570. 668.

(3) Chaplin v. Rogers, 1 East, 194.

(4) Manton v. Moore, 7 T. R. 67. Blenkinsop v. Clayton, 7

Taunt. 597.

(5) Hodson v. De Bret, 1 Campb. 233. Stoveld v. Hughes, 14 East, 312.

(6) Kelw. 77. pl. 25. see Lickbarrow v. Mason, 1 Hen. Bla. 363.

(7) Chaplin v. Rogers, 1 East, 194. Blenkinsop v. Clayton, 7 Taunt. 597.

(8) Hurry v. Mangles, 1 Campb. 452. Harman v. Anderson, 2 Campb. 243.

the vendee to keep a horse sold to him by a stable keeper at livery, though the horse be not moved out of the stable (1); or if goods which are ordered in a shop to be left till called for are weighed or measured (2), the transferring of goods in vendor's books to purchasers name (3); or the delivery of part of an entire quantity of goods contracted for (4), have all been construed to vest the property in the purchaser equally as an actual delivery (5), and the circumstance of the goods remaining in the vendor's possession, by election of the vendee, does not prevent the property vesting (6). The effect of a consignment of goods by a bill of lading is to vest the goods in the consignee, if however the bill be special to deliver the goods to A. for the use of B., the property is vested in B., and he has the right of bringing an action against the master of the ship if the goods be lost; but if the bill of lading be general to A., and the invoice alone shews that the goods are sent on account of B., the property is in A., and B. has only a trust. The consignee of a bill of lading may assign it to another (7). In the case of *Wright v. Campbell* (8), Lord Manfield made the following observations on this subject: "If there is an authority never so general, by indorsement upon a bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien till the delivery of the goods, and before they are actually sold and turned into money. If the factor pays it over with notice to a third person, then it may be followed in the hands of such third person; for in such case, it remains in the hands just as it did in the hands of the factor himself. But if the goods are *bonâ fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the statute of 21 Jac. 1. c. 19.; and the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered, and the owner can never

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lading.

(1) *Elmore v. Stone*, 1 Taunt. 408. Sed vide as to this case, *Howe v. Palmer*, 3 Barn. & Ald. 321.

(2) *Per Heath, J.* 1 Taunt. 459.; as to delivery of dock warrant, see 1 Gow. 58. 7 Taunt. 278.

(3) *Harman v. Anderson*, 2 Campb. 243. *Lucas v. Dorrien*, 7 Taunt. 278.; and see 1 Gow. 58.

(4) *Slubey v. Hayward*, 2 Hen.

Bla. 504. *Hammond v. Anderson*, 1 New Rep. 69.

(5) *Smith v. Chance*, 2 Barn. & Ald. 755.

(6) *Rugg v. Minett*, 11 East, 210.

(7) *Evans v. Marlett*, 1 Ld. Raym. 271. 12 Mod. 156. 3 Salk. 290.

(8) 4 Burr. 2050. and 1 W. Bla. 628.; see *Appleby v. Pollock*, Abbott on Shipping, 368.

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dispute with the vendee, because the goods were sold *bonâ fide*, and by the owner's authority." A blank indorsement of a bill of lading has the same effect as an indorsement to deliver to a particular person (1). Where there are several bills of lading, the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment (2). A bill of lading given before the goods are put on board is fraudulent, and the indorsement of it will convey no property in the goods, even to a *bonâ fide* indorsee (3). Where a bill of lading is taken by a creditor as a security for his debt upon his own account, the whole property passes by the delivery, and it is to be considered as a satisfaction of the debt *pro tanto*; but the parties are always at liberty to vary from the general rule by particular stipulations. Thus, where the consignor of goods from the West Indies wrote to his correspondents in England that he had been obliged to give a bill of lading to D., a creditor of the consignor, for the next proceeds of the goods, it being proved that the consignor had no intention to pass the whole property by the indorsement of the bill of lading, but merely to bind the consignment of the goods, and the amount of the goods had actually been accounted for by the executors of the consignor to D., after a loss of the goods at sea had happened, it was held that the consignor had an insurable interest in the goods after the indorsement of the bill of lading (4). An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor who has committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading (5). Goods were bought by Browne and Co. of Rotterdam, by order of Oddy and Co. of London, and shipped by Browne and Co. for Oddy and Co.; Browne and Co. then sent a letter to Oddy and Co., inclosing a bill of lading to the order of Browne and Co. unindorsed, and an invoice. Oddy and Co. delivered the bill of lading without indorsement to the defendants, on account of a debt antecedently due to them from Oddy and Co. The captain of the ship delivered possession of the goods to the defendants, and signed three bills of lading all to

(1) 6 East, 21, 2.

(4) Hibbert v. Carter, 1 T. R.

(2) Caldwell v. Ball, 1 T. R. 745.

205.

(5) Lempriere v. Pasley, 2 T. R.

(3) Osey v. Gardner, Holt, C. 485.
N. P. 405.

the order of Browne and Co., and the shippers transmitted one of the bills of lading indorsed to the plaintiffs. The court decided that the property in the goods had vested in the defendant: Lord Ellenborough, in the course of his judgment, observing, "that an indorsement of a bill of lading for a valuable consideration, and without notice by the indorsee of a latter title, passes the property. But supposing the plaintiffs to stand in the situation of Browne and Co., they would still not be entitled to recover. The goods were originally purchased for Oddy and Co. by their orders, and shipped for their use, and at their risk; they were therefore entitled to the possession of them as soon as they arrived, the shippers not having stopped them *in transitu*, and the only thing which stood between Oddy and Co. and such possession, was the circumstance of the captain having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns (1). Goods had been sent by Thompson from Ireland to Eustace and Holland, their agents in London, for the purpose of being sold; a bill of lading was afterwards sent not regularly indorsed, and Eustace and Holland sold the goods to Boehm and Taylor. Thompson having drawn bills on Eustace and Holland, which they were not able to pay, the plaintiff paid them for the honor of Thompson and Co.; and having knowledge of the above-mentioned transaction, he wrote to Thompson and Co. for an indorsement of the bill of lading, which they sent him. He then demanded the goods of the captain, and his demand not being complied with, brought an action of trover against the captain. Lord Kenyon held the circumstances stated a sufficient transfer of the property to Boehm and Taylor, as the factor had transferred the property, having a competent authority so to do; and it was not necessary that he should have the possession of the goods, or an indorsement of the bill of lading (2). The *bonâ fide* indorsee of a bill of lading, which has been indorsed to him as a security for debts due to him from the consignee, has a right to the possession of the goods against the consignor, though he knew at the time of the indorsement that the goods were not paid for by the con-

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(1) *Coxe v. Harden*, 4 East, 211.
(2) *Dick v. Lumsden, Peake*, 189.

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signee (1). No property, however, passes by the indorsement of a bill of lading without consideration (2). Merchants in London receive from a stranger abroad a bill of lading of certain goods, in a letter, requesting them to insure the goods. They declining to do business for the consignor, but acting *bonâ fide* for his interest, indorse the bill of lading to a friend of the consignor, who receives the goods, and afterwards fail with the proceeds in his hands. Lord Ellenborough ruled, that the merchants by indorsing the bill of lading, had made themselves liable to the consignor for the price of the goods (3). The property in goods for which the master of a ship has given bills of lading may be transferred, by delivering, without indorsing, the bill of lading; and such transfer will be good against all the world, except an indorsee of the bill of lading for a valuable consideration (4). Where an agent had purchased goods at Riga for the plaintiff, and put them on board the plaintiff's vessel, which had been sent for them, as the plaintiff's goods, the property was held to pass to the plaintiff, though the agent sent bills of lading indorsed in blank to his agent in England, with instructions that if the plaintiff did not accept his bills of exchange, the bills of lading should be indorsed over to the payees of the bills of exchange, which was accordingly done, and it was held that these proceedings of the agent did not change the property in the goods (5). A. of Liverpool, wishing to draw upon the banking-house of B. and Co. in London to a large amount, agreed (among other securities given) to consign goods to a mercantile house in London, consisting of the same partners as the banking house, but under the firm of B. and C. He accordingly remitted the invoice of the cargo, and the bill of lading indorsed in blank, to B. and C., but the cargo was prevented leaving Liverpool by an embargo. A. then became bankrupt, being considerably indebted to B. and Co., and the cargo was delivered to A.'s assignees by the captain. The court held that B. and C. might maintain trover for the cargo against the captain (6). Where the consignor of goods advised the consignee by letter, that he

(1) Cumming v. Browne, 9 East, 506, and 1 Campb. 104.

(2) Waring v. Cox, 1 Campb. 369.

(3) Corlett v. Gordon, 3 Campb. 472.

(4) Nathan v. Giles, 5 Taunt. 558.

(5) Ogle v. Atkinson, 5 Taunt. 759.

(6) Haille v. Smith, 1 Bos. & Pul. 563.

had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were then expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order or assigns, he or they paying freight for the said goods according to the charterparty; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo; it was held by the court of king's bench, that the invoice and the bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the goods in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu*, in case of the insolvency of the consignee. Lord Ellenborough, in giving judgment, laid great stress on the language of the invoice, that the goods were shipped for the account and at the risk of the consignee (1). In general it is the duty of a shipper of goods to send a letter of advice of the shipping to the consignee, but this is controlled by the course of dealing between the parties. (2)

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If several articles are ordered at the same time, though at separate and distinct prices, and forming one gross contract, the vendor cannot by a delivery of some articles entitle himself to the price of them separately, as in the case of a separate contract, the vendee not being obliged to accept or pay for any particular article, unless the same are furnished according to the terms agreed on. If the vendee however derive any benefit from the contract, and accept any one article so delivered, he thereby estops himself from contending that the contract was entire, and he will be obliged to accept and pay for so many as are individually furnished according to the contract (3). But if the sale be of an entire article, all the parts of which are essential to its use, the delivery of part by the seller, and acceptance by the buyer, will not sever the entirety of the contract; and the seller must de-

Where several things are ordered, forming one contract.

(1) *Walley v. Montgomery*, 3 *Waddington v. Oliver*, 2 Bos. & East, 585. Pul. 61. *Shields v. Davis*, 6 Taunt.

(2) *Goom v. Jackson*, 5 Esp. 65. *Farnsworth v. Garrard*, 1 112. Campb. 38. *Tye v. Gwynne*, 2

(3) See post. *Champion v. Hurst*, 1 Campb. 53.; and see *Campb.* 347. 3 Campb. 451.

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liver the whole before he can maintain an action for the price (1). A symbolical delivery of a commodity not in existence, and in an undeliverable state, will be ineffectual (2). And if an order be given to a tradesman to *make* goods for a customer, the property in the goods will not vest in the customer till they are actually finished, though even the price of them be paid (3). And the criterion to judge whether there has been a delivery on a sale, is to consider whether the vendor still retains in that character a right over the property (4); and if goods are delivered to the vendee upon condition, that it shall not be considered as a delivery by the seller, until some act is done by the buyer, no delivery can take place until such condition or act is performed. And where A. agreed to sell goods to B., who paid a sum of money to bind the bargain, and the goods were packed up in cloths furnished by B., and deposited in a building belonging to A. till B. should send for them, but A. declaring at the same time, that they should not be carried away till he was paid, this was held to be no delivery to vest the property in B. (5). And if any thing remain to be done on the part of the seller as between him and the buyer before the commodity purchased is to be delivered, the complete present right of property does not attach in the buyer (6); as a sale of oil out of a merchant's stock, consisting of several large quantities in different cisterns, no property passes without a separation of the part sold from the rest of the stock (7); and on a sale of a certain quantity of hemp, forming part of a larger quantity, the property does not pass from the vendor to the vendee till the hemp is weighed off. (8)

(1) Waddington v. Oliver, 2 New Rep. 61. Walker v. Dixon, 2 Stark. 281. Symonds v. Carr, 1 Campb. 361.

(2) Buck v. Davis, 2 Maule & S. 397.; and see 2 Barn. & Ald. 248.

(3) Dutton v. Solomonson, 3 Bos. & Pul. 584. Vale v. Bayle, Cowp. 294.

(4) Goodall v. Skelton, 2 Hen. Bla. 316.

(5) Goodall v. Skelton, 2 Hen. Bla. 316.; and see Ogle v. Atkinson, 1 Marsh, 323. 5 Taunt. 759.

(6) Slubey v. Hayward, 2 Hen. Bla. 501. Hammond v. Anderson, 1 New Rep. 69. Hanson v. Meyer, 6 East, 614. Wythers v. Lyss, 4 Campb. 237. Rugg v. Minett, 11 East, 210. Whitehouse v. Frost, 12 East, 614. Austen v. Craven, 4 Taunt. 644. Jackson v. Anderson, 4 Taunt. 24.

(7) White v. Wilkes, 5 Taunt. 176. 1 Marsh, 258.

(8) Shepley v. Davis, 5 Taunt. 617. Bush v. Davis, 2 Maule & S. 397.

When goods are sold to be paid for in thirty days, and if not carried away at the end of that time warehouse rent to be paid for them, the property in the goods vests absolutely in the purchaser from the moment of the sale, the agreement to give stowage room for thirty days being introduced for the benefit of the buyer, and being part of the consideration for which the purchase money is to be paid (1); and after a contract for the sale of goods, and a written order to the wharfinger to deliver the goods, which order was assented to by him, the property passes to the vendee, though no actual transfer be made in the wharfinger's books (2). And in deciding questions relating to the delivery of the property in goods sold from the seller to the buyer, the courts will be disposed to give effect to those usages of trade which experience has shewn to be convenient, even though they should be of no long standing; as where goods being entered in the books of the West India Dock Company in the name of A. he receives the usual cheque for them, which, having sold the goods to B., he indorses and delivers to him; B. sells the goods and delivers the cheque to C. on credit; on C's insolvency A. cannot take possession of the goods, although they have continued to stand in his name, and the cheque has not been lodged with the Dock Company, the practice being, that the indorsed dock warrants and certificates are handed from seller to buyer as a complete transfer of the goods (3). But usage of trade will not govern a question as to delivery of goods where it is inconsistent with the evident intention of the parties, and the seller has done what expressly shews his intention as to the delivery; as where by the usage of trade at Liverpool, if goods are lying in a warehouse at the time when they are sold, the venders pay rent for them for two months, if the vendee allows them to remain there so long, this usage does not prevent the property vesting in the vendee immediately on the vender giving the usual order to the warehouse-keeper to deliver the goods to the vendee (4). A mere delivery of goods by the seller at a wharf for the purchaser, at which wharf he had on former occasions delivered

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(1) *Phillimore v. Barry*, 1 Campb. 513.

(2) *Lucas v. Dorrien*, 7 Taunt. 278. 1 M'gore, 29. S. C. *Searle v. Keeves*, 2 Esp. 598. *Keyser v. Suse*, 1 Gow. N. P. C. 58 and 65, note.

(3) *Shear v. Raven*, 4 Campb.

251.; and see *Lucas v. Dorrien*, 7 Taunt. 278. *Harman v. Anderson*, 2 Campb. 243. *Stonard v. Dunkin*, 2 Camp. 344. *Keyser v. Suse*, 1 Gow. 58.

(4) *Greaves v. Hepke*, 2 Barn. & Ald. 131.; and see *Hammond v. Anderson*, 1 N. R. 69.

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Delivery to carrier, agent, etc.

goods for the same purchaser, unless the seller procure them to be booked, or deliver them to some person authorized to receive them. (1)

Where the vendee of goods directs them to be sent to him by a carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, and the property is charged; and the delivery will be sufficient, though the carrier be not named by the vendee (2), *a fortiori* if the goods be delivered to a carrier named by vendee, and though the seller is to pay the carrier for the carriage of the goods, the property vests in the buyer at the moment the goods are delivered to the carrier, and if any loss takes place he must sustain it (3); and where nothing is said as to any carrier, but goods are ordered to be sent generally to purchaser, the goods are to be delivered in the most usual and convenient way (4); and if so delivered it will be sufficient. So a delivery to a wharfinger, to be shipped in due course to order, charges the vendee; and if the vendor writes upon the wharfinger's assertion that the goods will go by a particular vessel, on non-arrival thereby the vendee is bound to apprise the vendor, at the risk of the consequences (5); so if a person order goods from a merchant in London, the delivery is complete as soon as the goods are shipped (6); though not so as to take the case out of the statute against frauds, unless there be a written contract or earnest paid (7). And the delivery of goods to any authorized agent of the purchaser will be a discharge of the contract, but it must be clearly shewn that he was the purchaser's agent. And where the plaintiff bought some plate at the shop of the defendant, a silversmith, and the defendant by the plaintiff's directions delivered the plate to an engraver, to engrave the plaintiff's arms on it, both parties directing the engraver to bring back the goods to the defendant who was to pay for the engraving, the court held that there could be no delivery to the plaintiff, unless the engraver could be considered

(1) *Buckman v. Levi*, 3 Campb. 414.

(2) *Dutton v. Solomonson*, 2 Bos. & Pul. 582. *Copeland v. Lewis*, 2 Stark. 33. *Vale v. Bayle*, Cowp. 294.

(3) *King v. Meredith*, 2 Campb. 639.

(4) *Copeland v. Lewis*, 2 Stark.

34. Bul. N. P. 36. *Hanson v. Armitage*, 5 Barn. & Ald.

(5) *Cooke v. Ludlow*, 2 N. R. 119.

(6) *Huxham v. Smith*, 2 Campb. N. P. C. 19.; and see *Brown v. Hodgson*, 2 Campb. 36.

(7) *Hanson v. Armitage*, 5 Barn. & Ald.

as his agent or servant, but that there was no pretence for considering him in that situation, as he was employed by the defendant and not by the plaintiff, and as the plate was to be returned to the defendant who was to pay for engraving it. (1)

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Of performance
by payment.

When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is so far transferred to the vendee, as to give him a complete right to them on the payment of the price agreed upon; but he cannot take the goods until the payment of the price to the vendor. If he tender the price, and the vendor refuse it, the vendee may then seize the goods, or have an action against the vendor for detaining them. The payment of part of the price by way of earnest will also vest the property in the thing sold; thus, if a man sell a horse to another and receive part of the price, and the horse die while in the possession of the vendor, before delivery to the vendee, or payment of the remainder of the purchase money, still the vendor is entitled to the payment of the price, because the payment of the earnest is a part performance of the contract, and vests the property in the vendee (2). The payment of earnest however only binds the bargain, and does not determine the right of the vendor to demand payment of the price by the vendee, before he parts with the goods, unless it has been agreed upon between the parties, that a certain time shall be given for payment (3). If a man offer money for goods in a market, and the seller agree to take the offer, and while the buyer is telling out his money as fast as he can, the seller sells the goods to another, the buyer may upon payment or tender, or refusal of the price agreed upon, take the goods (4). When no time is specified for payment in the contract of sale, the money is demandable immediately on the delivery of the goods, but both the mode and time of payment are subject to whatever particular stipulations the parties may choose to agree upon. Where one agrees to deliver a commodity at a certain price, in a limited time, he cannot demand payment till the whole commodity is delivered, for an entire contract cannot be apportioned (5). So in cases

(1) *Owenson v. Morse*, 7 T. R. 64.

(2) 2 Bla. Com. 448. Long on Personal Property, 147, 8.

(3) See *Shep. Touch. 224*. Back v. Owen, 5 T. R. 409.

(4) *Shep. Touch. 225*. *Roberts*, Statute of Frauds, 165. 170.

(5) *Waddington v. Oliver*, 2 Bos. & Pul. 61.; and see *Walker v. Dixon*, 2 Stark. 281.

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where the plaintiff undertakes to do some particular and entire act, he cannot recover payment for a proportionate part of the work and labour bestowed in the performance of such entire contract, but must proceed for the whole, even though the work has been by some accident destroyed before, or he has been prevented by his employer from finishing the remainder of his work (1). And this right, like all other mercantile claims, may be controlled by particular usages, as where the plaintiff sought to recover the reward of his labour, in printing certain works which had been consumed by fire, before delivery to the defendant; it was held that he could not recover, because the usage of trade was proved to be, that a printer is not to be paid for any part of his work until the whole is completed and delivered (2). When goods are delivered under an agreement to take a specific parcel of copper halfpence in payment, a delivery of the halfpence will prevent the seller supporting an action for the price of the goods, though the larger number of the halfpence prove counterfeit (3). It is no waiver of the vendor's right to be paid for goods sold on delivery, that he allowed part of them to be carried away without being paid for, and he may refuse to deliver the remainder without payment (4). But if goods are sold, to be paid for in ready money, the vendor should not deliver the whole of them without payment, if he does, he waives the mode of payment stipulated for, and lets in any other, which by law is accounted such, as a set off. (5)

Sending money
by post.

Where a creditor directs his debtor to remit him by post the money due to him by a bill of exchange, cash, note, &c., or where it is the usual way of paying such debt, if the bill be lost the debtor will be discharged (6); but where the defendant, in discharge of a debt which he owed to the plaintiff, delivered a letter containing the bills which were lost to a bellman in the street, it was decided that he was not discharged from liability

(1) Vide post. *Gandell v. Pontyn*, 4 Campb. 375. 1 Stark. 137.

198. S. C. *Clark v. Mumford*, 3

Campb. 37. *Hulle v. Heightman*,

2 East, 445. 1 Hen. Bla. 287.

4 East, 147. 1 New Rep. 330.

2 Bos. & Pul. 221. 1 Marsh. 122.

See vide 4 Campb. 186. 3 Burr.

1592.

(2) *Gillet v. Mawman*, 1 Taunt.

(3) *Alexander v. Owen*, 1 T. R. 225.

(4) *Payne v. Shadbolt*, 1 Campb. N. P. C. 427.

(5) *Cornforth v. Rivett*, 2 Maule & S. 510.

(6) *Warwick v. Noakes, Peake*, 67.

to pay the debt, because it was incumbent on him to have delivered the letter at the general post office, or at least a receiving house appointed by that office. (1)

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Payment by
bills, etc.

If credit be given by the vendor or other contracting party as a voluntary act, subsequent to and not making any part of the original contract, it may at any time be revoked (2). But though by the terms of the contract a party is entitled to demand immediate payment, if he take a bill of exchange or cheque upon a banker payable at a future day, he cannot sue upon the original consideration, until the expiration of the time which such bill or cheque has to run, and he has used due diligence to obtain the payment of such bill or cheque, provided such security be a valid and good one; and even an extent in aid, on behalf of the crown, cannot be issued against a person from whom the principal debtor has taken a bill (3) which is not due (4). If however the bill or cheque should be ascertained to be a void or invalid security, as where the drawee is insolvent (5), it is not considered as a payment, and the vendor may resort to his original debt and contract; that is, where the security was accepted as an indulgence to the vendee, and not in consequence of a contract for credit at the time of the contract, in which latter case the vendor must wait till the time of the credit expires, even though the bill agreed to be given in the meantime be waste paper. (6)

(1) *Hawkins v. Rutt, Peake*, 186.; and see *Parker v. Gordon*, 7 East, 385.

(2) *De Symons v. Minchwich*, 1 Esp. Rep. 430.

(3) *Stedman v. Gooch*, 1 Esp. N. P. C. 5. *Smith v. Wilson, And.* 187. *Ward v. Evans*, 2 Ld. Raym. 928, 9, 30. 2 Salk. 452. *Chamberlain v. Delarive*, 2 Wils. 353. *Hebden v. Hartsink*, 4 Esp. N. P. C. 46. 5 T. R. 513. 3 Taunt. 130. 4 Esp. 30. 159. *Tempest v. Ord*, 1 Mad. 89. *Bolton v. Richard*, 6 T. R. 139. *Vernon v. Boverie*, 2 Show. 296. *Exparte Blackburne*, 10 Ves. 204, 6. *Brown v. Kewley*, 2 Bos. & Pul. 518. *Harley v. Greenwood*, 5 Barn. & Ald.

95. *Tapley v. Martens*, 8 T. R. 451. *Exparte Dickson*, cited in 6 T. R. 142, 3. 1 Esp. Rep. 106.

(4) *Rex v. Dawson, Wightw.* 32.

(5) *Brown v. Kewley*, 2 Bos. & Pul. 518.

(6) *Stedman v. Gooch*, 1 Esp. N. P. C. 5. 4 East, 75. Anon. 12 Mod. 517. *Puckford v. Maxwell*, 6 T. R. 62. *Owenson v. Morse*, 7 T. R. 64. *Bishop v. Shillito*, 2 Barn. & Ald. 329. n. a.; and see 4 Taunt. 288. 1 Esp. 129. 317. 1 Taunt. 353. 7 T. R. 243. 1 East, 58. n. a. 2 Bos. & Pul. 118. 1 Esp. 445. 4 Esp. 7. 7 Ves. 597. 3 Maule & S. 363.

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If a party, in either of the above cases, agree (1) to receive the bill or instrument as money, and run all risks of its being paid, then indeed the taking of such bill or instrument will be considered as a complete payment though the instrument be not paid, and if he do not use due diligence to get it paid, the person from whom he received it, and every other party to the bill, will be discharged (2). It suffices however for the plaintiff when the original bill was received in satisfaction from a *third person*, and the original debtor, the defendant, was no party to the bill, to prove the due presentment for acceptance or payment and the dishonor, without shewing that he gave notice to the drawer of such bill, unless the defendant can prove he sustained some actual loss for want of such notice (3). In general, if a creditor prefer a bill of exchange, accepted by a third person, to ready money, from his debtor, he must abide by the hazard of the security; but if an *agent* of the debtor offer the creditor payment in cash, or by cheque on his banker, and the creditor prefer the cheque, this will not discharge the debtor if the cheque be dishonoured, although the agent failed with a balance of his principal in his hands to a larger amount (4). Taking a bill in payment from the ostensible partner in a firm, which bill is afterwards dishonoured, will not prevent the creditor from suing an unknown partner for the debt when he is discovered (5). Where a bill or cheque is given in payment, and afterwards lost by the payee, such bill or cheque will be so far considered as a payment, as to protect the debtor from any action upon the original consideration, where the creditor refuses to indemnify the debtor against his liability on the bill or cheque (6); and it would seem that the same rule would prevail even had the creditor offered sufficient and unexceptionable indemnity, if the bill or cheque be indorsed or payable to bearer. (7)

(1) The act of writing a receipt in full will not be evidence of such an agreement. Chitty on Bills, 287.

(2) 3 & 4 Ann. c. 9. s. 7. Vernon v. Boverie, 2 Show. 296. Ward v. Evans, 2 Ld. Raym. 930. 11 Mod. 521. Dent v. Dunn, 3 Campb. 296. and *supra* note.

(3) Bishop v. Rowe, 3 Maule & S. 362. Swinyard v. Bowdler, 5 Maule & S. 62. Sed vid. Bridges

v. Berry, 3 Taunt. 130.

(4) Everett v. Collins, 2 Campb. 515. Tapley v. Martens, 8 T. R. 451. Marsh v. Pedder, 4 Campb. 257.

(5) Robinson v. Wilkinson, 3 Price, 538.

(6) Bevan v. Hill, 2 Campb. 381.

(7) Pierson v. Hutchinson, *id.* 211.

A payment to a person authorized to receive the same is equivalent to payment to the principal, but the agent must always act with his principal's authority; and if a servant, with no authority so to do, take a bill of exchange in payment, instead of the money itself, the principal will not be bound, unless, he assent to the payment (1). But a general authority given to an agent to receive monies, and transact the affairs of his principal, will bind the principal for any acts done by the agent under such authority, and the principal cannot determine this general authority for a time by any particular instructions or orders (2). And if the owner of goods allow his broker to sell them as a principal, the purchaser will be discharged by paying the price of the goods to the broker (3). And if the principals, on some occasions, allow their broker to draw bills in their own name for goods which they have sold on their account, they are bound by a payment made to the brokers by a purchaser (4). If a creditor take the security of the agent of his debtor in payment of the debt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals in any manner differently with the agent on the faith of the receipt, the principal is discharged, though the security fail. But the principal is not discharged from the payment unless he can shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in time. (5)

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Payments to
agents, &c.

In general, where a party owes several debts, and not one entire account, and pays money generally to the creditor, without directing that it shall be applied in satisfaction of one of the debts in particular, the creditor may apply it in discharge of any one of the debts he may think fit (6); and this even to

As to application
of payments.

(1) Ward v. Evans, 2 Ld. Raym. 928. 2 Salk. 442. 1 Com. 138. 6 Mod. 36. Thorold v. Smith, 11 Mod. 87.

(2) Nickson v. Brohan, 10 Mod. 109. Drinkwater v. Goodwin, Cowp. 251.

(3) Coates v. Lewes, 1 Campb. 444.; and see Drinkwater v. Goodwin, Cowp. 251. Faven v. Bennett, 11 East, 36.

(4) Townsend v. Inglis, Holt, C. N. P. 278.

(5) Wyatt v. Marquis of Hertford, 3 East, 147.

(6) Goddard v. Cox and Bloss v. Cutting, 2 Stra. 1194. Bosanquet v. Wray, 6 Taunt. 597. Kirby v. Duke of Marlborough, 2 Maule & S. 18. Peters v. Anderson, 5 Taunt. 596. 1 Marsh. 238. Hall v. Wood, 14 East, 243. n. a. Clayton's case, 1 Merival, 572. Bodenham v. Purchas, 2 Barn. & Ald. 39. Campbell v. Hodgson, 1 Gow. N. P. C. 74. Brooke v. Enderby, 2 Brod. & B. 70.

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the prejudice of a party who was surety for one of the debts (1); but where there is anything arising out of the circumstances of the transaction to shew that the party paying the money intended it to be applied to a particular debt, as a direction to that effect, or a payment to the exact amount of that debt, and particularly in favour of a surety, there it must be considered as applicable to that particular debt (2). And in an account with bankers, the payments, advances, and receipts on each side, are to be considered as applicable in reduction of the earliest part of the account (3). And where bankers discounted for the drawer a bill accepted for his accommodation, and after it was dishonoured were informed of that fact, and requested by the drawer not to apply to the acceptor, and afterwards the drawers account with them was in his favour, it was decided, that the balance being thus turned in his favour, the bill was to be considered as satisfied, although afterwards the drawer became insolvent, and was much indebted to them in subsequent advances. (4)

Payment when
presumed.

Where there has been a series of dealings, the last receipt will be considered as presumptive evidence that all the previous payments have been made, and especially if the receipt be in full of all demands; and if this admission of such receipt were under hand and seal, the presumption is so strong, that the party will not be allowed to prove the contrary (5). In an action for work and labour done for the defendant, proof that the plaintiff and other workmen, who were employed by the defendant, came regularly to receive their wages from the defendant, whose practice was to pay every week, and that the plaintiff had not been heard to complain of nonpayment, would be presumptive evidence of payment to meet an old demand (6). And it seems that, independently of the statute of limitations, length of time,

(1) *Plomer v. Long*, 1 Stark. 153. 74. *Welsh v. Seaburn*, 1 Stark. 474. 2 Esp. Rep. 666.

(2) *Newmarch v. Clay*, 14 East, 239. *Maryatts v. White*, 2 Stark. 101. *Birch v. Tebbutt*, 2 Stark. 74. 2 Esp. Rep. 666. (4) *Marsh v. Houlditch*, Chitty on Bills, 6 ed. 289. n.d.

(3) *Clayton's case*, 1 Merival. 585. 608. *Brooks v. Enderby*, 2 Brod. & B. 70. 2 *Bridgm. In.* 586, 7. 2 Id. tit. Trade. *Bodenham v. Purchas*, 2 Barn. & Ald. 39. *Birch v. Tebbutt*, 2 Stark. 74. *Welsh v. Seaburn*, 1 Stark. 474. 2 Esp. Rep. 666. (4) *Marsh v. Houlditch*, Chitty on Bills, 6 ed. 289. n.d. (5) *Gilb. Debt. Evid.* 142. *Alner v. George*, 1 Campb. 392. *Dalzell v. Mair*, 1 Campb. 532. *De Gacinde v. Pigou*, 4 Taunt. 246. 3 Bla. Com. 371.

(6) *Lucas v. Novosilienski*, 1 Esp. N. P. C. 296.; and see 3 Campb. 10.

added to other circumstances, will operate in the opinion of a jury as a presumption of payment. (1)

It may be presumed that a bond has been satisfied, after a forbearance of twenty years unexplained by the obligee, for the forbearance for so long a time is a circumstance from which it is reasonably to be presumed that the bond has been satisfied (2). And it has sometimes been said, that payment may be presumed even within that time (3); but this is to be understood with reference only to those cases where there has been some other evidence to raise such a presumption, as the settling of an account within the intermediate time, without noticing any demand upon the bond. (4)

However, the presumption arising after such a length of time may be repelled by proof of the defendant's recent admission of the debt, or by proof of the payment of interest within twenty years, which is an acknowledgment that the principal sum was not then discharged (5), or that the obligee has resided abroad for the last twenty years (6), or that the obligor was in insolvent circumstances, and had no opportunity of means of payment (7); or the presumption may be answered by proof of other circumstances, explaining satisfactorily why an earlier demand has not been made (8); and the fluctuation of credit, together with the circumstance of the security remaining with the obligee, is a circumstance of great weight to rebut presumption of payment thereof (9). An indorsement by the obligee, purporting that part of the principal sum has been received, if made after the presumption of payment has arisen, is inadmissible (10). And further, if the defendant produces direct evidence of the payment of the principal sum and interest at a certain time within twenty years, the plaintiff will not be allowed to encounter that evidence by an

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(1) Cooper v. Turner, 2 Stark. 101.

497.; and see 5 Maule & S. 75. (7) Fladong v. Winter, 19 Ves. 196.

(2) 6 Mod. 22. 4 Burr. 1963. (8) Newman v. Newman, 1 Stark. N. P. C. 101.; and as to where presumption of payment may be rebutted, 2 Ves. 42, 3. Oswald v. Legh, 1 T. R. 270. 5 T. R. 123. 2 Stra. 826. 8 Mod. Phillips on Evid. 5 ed. 1 vol. 156. 279. S. C. 2 Ld. Raym. 1370. 2 vol. 138. S. C. 3 Brown, P. C. 593. S. C.

(3) 1 Burr. 484. Cowp. 109.

(4) 1 T. R. 271, 272. 4 Burr. 1963. Colsel v. Budd, 1 Campb. 27. (9) 19 Ves. 199. 1 Stark 374.

(5) 1 T. R. 270.

(6) Newman v. Newman, 1 Stark 827. (10) Turner v. Crisp, 2 Stra.

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indorsement in the handwriting of the obligee, purporting that interest was paid at a subsequent time; for supposing the fact to be true, that the bond had been satisfied by payment, it would obviously be his interest to make such an indorsement which might afterwards be used as evidence in an action on the bond. (1) It has been considered, with analogy to the presumption of payment of a bond, after twenty years have elapsed, that a note, payable on demand, and dated upwards of twenty years before the commencement of the action, may be presumed to have been paid, and that there will be a good defence under the general issue, the statute of limitations not having been pleaded (2). But in an action by the payee of a bill of exchange, accepted by the defendant for a valuable consideration, the evidence that the plaintiff had been discharged as an insolvent debtor after the bill became due, and had given in a blank schedule, is not enough to shew that the bill had been satisfied. (3)

**Tender of per-
formance.**

It is a good defence to an action for the non-performance of the contract, to say that the defendant offered and was always ready to perform it, as where a party has agreed to execute a deed in favour of another, it suffices if he tender a draft of such deed, and it is not necessary to proceed to execute a conveyance if the other party refuse to complete the bargain (4). And where concurrent acts by two parties are to be performed, a readiness and offer by one person to perform his part entitles him to proceed against the other for refusing to perform his part, without making a formal tender, as in the case of a sale of goods to be paid for on delivery, when the purchaser is ready to pay and the vendor refuses to deliver. (5)

**What sufficient
tender, in rela-
tion to the
manner of
making it.**

As the sufficiency of a tender of money frequently becomes the subject of litigation, it may be advisable to inquire what shall be considered a sufficient tender. To sustain a plea of tender, it is not in all cases necessary to prove the actual production of the money in monies numbered, it may be sufficient to shew that the defendant was in a present condition to substantiate his offer (6), and that the plaintiff dispensed

(1) *Rose v. Bryant*, 2 Campb. 322.

(2) *Duffield v. Creed*, 5 Esp. Rep. 52. *Tidd*, 6 ed. 22 to 25.

(3) *Hart v. Newman*, 3 Campb. 13.

(4) *Jones v. Barclay*, Dougl. 684.

(5) *Rawson v. Johnson*, 1 East.

203.

(6) *Thomas v. Evans*, 10 East,

101. *Douglas v. Patrick*, 3 T. R. 683.

with the production of the money; but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor, and the mere telling a party that he has the money for him, without making an offer of it, is no tender (1).

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TENDER.

Where there is a dispute as to the amount of the demand, the plaintiff by objecting to the quantum may dispense with the tender of a specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender by expressly saying that the defendant need not produce the money as he would not accept it, for though the plaintiff might refuse the money at first, yet if he saw it produced he might be induced to accept it (2). If the debtor tenders a larger sum than is due *and asks change* this will be a good tender if the creditor does not object to it on that account, but only demands a larger sum; and there is not any occasion to produce the money, if the creditor refuses to receive it on account of more being due (3). And where A., who is indebted to B., C., and D. jointly, and to B. separately, tenders to B. the amount of the joint and separate debts, which he refuses to accept without objecting to the form of the tender, on account of his being entitled only to the joint or separate demand, this is a good tender either to the partnership or separate debt (4). Where the debtor at the time of the tender endeavours to impose a condition on the creditor, to which he does not consent, this will be no good tender. Thus an offer to pay a sum of money, with a condition that it shall be accepted as the whole balance due when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid (5). A tender of bank notes, if not objected to on account of their being such, is a good tender (6); a tender of foreign money made current by royal proclamation is equivalent to a tender of lawful money of England (7); a tender of twenty guineas in the current coin of the realm, with a request to pay over the difference of fifteen guineas, is a good tender as to the fifteen

In relation to the
sum tendered.

(1) Thomas v. Evans, 10 East, 101. Douglas v. Patrick, 3 T. R. 683.

(2) 4 Esp. N. P. C. 68.

(3) Peake Rep. 88. Bettersbee v. Davis, 3 Campb. 70. Robinson v. Cook, 6 Taunt. 336. Saunders v. Graham, 1 Gow. N. P. C. 121.

(4) Douglas v. Patrick, 3 T. R. 683.

(5) Evans v. Judkins, 4 Campb. 156.

(6) Per Buller, J. in Wright v. Reed, 3 T. R. 554. Grigby v. Oakes, 2 Bos. & Pul. 526.

(7) 5 Rep. 114 b.

**VIII. THE
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guineas (1), for he has only to select so much and restore the residue; but a tender in this manner of bank notes, without any particular objection being made but a general refusal to accept same, is not good, for it may be physically impossible for the creditor to take what is due and return the difference (2), and in this case the safest way is always to tender the fraction of a pound in specie if accompanied with a tender of bank notes. But if the creditor to whom a tender of a bank note is made in payment of a fractional sum, object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, although the creditor is required to return the difference between the bank note and the fractional sum, it is a good tender (3).

By and to whom
made.

Any party being an agent of the debtor may tender the money, and the tender enures the principal, although the agent was authorized only to tender a less sum. (4) The tender need not be made to the creditor himself, it may be made to any person or agent authorized to receive payment, though the principal ordered him not to accept it (5); a tender to one of two joint creditors is a tender to both. (6)

When it must
be made.

The tender must be made before the commencement of a suit. The line being drawn at the commencement of the suit, steps taken by the plaintiff in contemplation only of an action before tender made will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of the plaintiff's suit, and the mere instructions to an attorney to commence a suit will not invalidate the tender (7). Where the plaintiff brings an action of debt for the nonpayment of rent, and afterwards discontinues the action and commences a fresh action in covenant, a tender before the commencement of the latter action will be good. (8)

(1) See ante.

(2) *Bettersbee v. Davis*, 3 Campb. 70. *Spigbey v. Hide*, 1 Campb. 181. *Robinson v. Cook*, 6 Taunt. 336.

(3) *Saunders v. Graham*, 1 Gow. N. P. C. 121.

(4) *Read v. Goldring*, 2 Maule & S. 86.

(5) *Goodland v. Blewitt*, 1 Campb. 477.; see also *Moffatt v. Parson*, 5 Taunt. 307. 1 Marsh. 55. S. C.

(6) *Douglas v. Patrick*, 3 T. R. 683.

(7) *Brygs v. Calverley*, 8 T. R. 629.

(8) 1 Moore, 200.

The debtor should always at the time when the money according to the terms of the agreement becomes due, tender the same, and always be ready and willing to pay it afterwards, for the mere tendering it afterwards is not sufficient to discharge him from an action for the non-performance of the contract, and the neglect to tender on the day the money became due is a sufficient cause of action for the non-performance of the contract; and if any special damage arise to the creditor by reason of the non-payment or tender of the money on the day it became due, he will recover such damages. (1)

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The effect of a tender is not equivalent to payment itself (2); and to a plea of tender the plaintiff may shew that he made a subsequent demand of the sum tendered, and that defendant refused to pay the same, and the defendant will be thus deprived of the benefit of his original tender. But the plaintiff's demand must be of the sum originally tendered and not of a larger sum (3), and this subsequent demand ought to be made by some person authorized to give the debtor a discharge (4). A subsequent application to one of two joint debtors, and a refusal, is sufficient. (5)

How tender
rendered of
no avail by
subsequent
demand.

IX. In general the performance of a contract can only be suspended or delayed in its performance by the express or implied consent of both parties (6), or by operation of law, no observations are necessary on cases where the contract to suspend is express, excepting that where the contract was by deed, any subsequent stipulation varying it must at law be under seal, unless it were provided for by the original deed (7). An implied contract to suspend an agreement may arise from the wrongful act of one party in delaying the other in the performance, as if a man contract with another to build a house by a certain time; and the latter prevent the

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- (1) Sweetland v. Squire, Salk. 2 T. R. 27.
622, 3. Paine v. Peploe, 8 East, 168. Giles v. Harris, 1 Ld. Raym. N. P. C. 181.
254. S. C. by the names of Giles v. Hart, 2 Salk. 622. Comb. 443. N. P. C. 478. n.
Carth. 413. Holt. 556. 12 Mod. (5) 1 Stark. 323.
152. 3 Salk. 343. Johnson v. (6) Cuff v. Penn, 1 M. & S. 21.
Clay, 7 Taunt. 486. Wood v. (7) Littler v. Holland, 3 T. R.
Ridge, Fort. 376. 590. 8 T. R. 280, 1. Equity how-
(2) Heathcote v. Crookshanks, ever will relieve, 2 Atk. 560, 1.

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workmen from completing it, or in case of eviction, the lessee evicted is not bound to pay rent during the time he was evicted. So where a lessor has covenanted to deliver good beer, and neglects to do so, this suspends the liability of the lessee to perform his covenant to purchase beer of the lessor, but as soon as the lessor offers to deliver good beer, the lessee is bound to purchase it, for the lessor's breach of covenant on one occasion will not release the lessee from his continuing covenant to purchase on other occasions (1). So the obligation to perform a contract may be suspended by operation of law, as where the right to sue and the obligation to perform unite; for instance, when a feme executrix marries a debtor to her testator, the right of action is only suspended during the coverture, and if she survive, she may in that character sue the executors of the husband. (2)

How a contract may be altered.

If an agreement be once completely entered into, any subsequent alteration thereof by a party interested, without the consent of the other parties in any material part, will render the agreement wholly invalid as against the party not consenting to such alteration; and where the contract was in writing, he is not bound to perform it, even in its original terms, on account of the fraud attempted to be practised on him, and the jealousy of the law to prevent fraud (3). Thus after the execution of a policy of insurance the time of sailing was enlarged by the assureds, and acquiesced in by all the underwriters, except the defendant, and it was held that this was a material alteration, and the policy was void as to him, and consequently the assureds could not recover the amount of his subscription, although they might from the other underwriters, who assented to the alteration (4); but an alteration in a material part, by a mere stranger to the instrument, and not legally interested in it, will not vitiate the same as against any party, provided, where it was in writing, its original terms can be ascertained (5). In the case of bills of

(1) 6 Taunt. 155.

(2) Cro. Eliz. 114. 3 Atk. 726. see post.

(3) Com. Dig. tit. Fait. Master v. Miller, 4 T. R. 320.

(4) Fairlie v. Christie, 1 Moore, 114. Campbell v. Christie, 2 Stark. N. P. C. 64. Langhorn v. Cologan, 4 Taunt. 330. 35 Geo. 3.

c. 63. s. 13. Kensington v. Inglis, 8 East, 273. Hill v. Patten, 8 East, 373. French v. Patten, 9 East, 351. Hubbard v. Jackson, 4 Taunt. 169.

(5) Henfree v. Bromley, 6 East, 308.; sed vide 11 Rep. 27 a. contra.

exchange, however, such an alteration would vitiate it (1); and if a bill or promissory note be altered in any material part, such as the date, sum, or time when payable, without the consent of the parties, such alteration will at common law, and independently of the stamp acts, render the bill or note wholly invalid as against any party not consenting to the alteration, and this, although the bill be not negotiated at the time of the alteration, or it be in the hands of an innocent holder (2), and if there be no privity between the holder and the party sued, the holder has no remedy whatever as against such party (3). If upon a bill being presented for acceptance, the payee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawer and indorsers; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between him and the acceptor, and keeping the bill, and presenting it for payment at the deferred period, is proof of such acquiescence, and the holder cannot afterwards maintain an action on the case against the acceptor for thereby destroying the bill (4). Where an alteration is made with a fraudulent intent, it will in some cases amount to a forgery. (5)

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But if an alteration be made in any part of an agreement or negotiable instrument which is not material, or it be made merely for the purpose of correcting a mistake, and in furtherance of the original intention of the parties, such alteration, though made after the agreement or instrument is complete, will not invalidate it (6). However, alterations and erasures will fre-

(1) *Master v. Miller*, 4 T. R. 320. 5 T. R. 367. 2 Hen. Bla. 141. Anstr. 225. S. C. Com. Dig. Fait. F. 1. *Powell v. Divett*, 15 East, 29.

(2) See 1 Ann. st. 2. c. 22. s. 2 and 3. to which subsequent acts refer. *Bathe v. Taylor*, 15 East, 416. *Chitty on Bills*, 6 ed. 100. 103.; see last note. *Bowman v. Nichol*, 5 T. R. 537. and *Corrie v. Halsale*, 4 Barn. & Ald. 197. (but as to last case, see 2 Geo. 4. c. 78.) *Calvert v. Roberts*, 3 Campb. 343. *Prince v. Nicholson*, 1 Marsh. 72. n. c.; sed quære as to two last cases, see *Downes v. Richardson*, 5 Barn.

& Ald. 674. *Cardwell v. Martin*, 9 East, 190. 1 Campb. 79. S. C. *Walton v. Hastings*, 4 Campb. 223. 1 Stark. 215. S. C. *Outhwaite v. Hamley*, 4 Campb. 179. *Clark v. Blackstock*, Holt, C. N. P. 474. *Kennerley v. Nash*, 1 Stark. 452. *Jacobs v. Hart*, 2 Stark. 45.

(3) *Long v. Moore*, cited 3 Esp. 155. in notes.

(4) *Paton v. Winter*, 1 Taunt. 420.; and see 6 East, 309.

(5) *Rex v. Treble*, 2 Taunt. 329. 4 Bla. Com. 247. 249. *Master v. Miller*, 4 T. R. 325. 330.

(6) *Saunderson v. Symonds*, 1 Brod. & B. 426. *Kershaw v. Cox*, 3 Esp. N. P. C. 246. cited 10 East,

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Of the admissibility of *parol evidence* to affect a contract.

quently give the transaction an appearance of fraud, and the proof as to propriety of, and circumstances under which such alteration was made, will always be thrown on the party who made such alteration. (1)

It is a general rule of the common law that parol evidence cannot be admitted to contradict, add to, or vary the terms of any written instrument; for it would be dangerous and inconvenient that matters in writing, made in general advisedly and on consideration, and which finally import the certain truth of the agreement of the parties, should be controuled or affected by any statement of parties to be proved by uncertain parol testimony (2). And the same rule applies to all such written agreements as are required by the statute of frauds to be in writing (3).

435, and 15 East, 417. *Jacobs v. Hart*, 2 Stark. N. P. C. 45. *Robinson v. Touray*, 1 Maule & S. 217. *Robinson v. Tobin*, 1 Stark. N. P. C. 336. *Webber v. Maddocks*, 3 Campb. 1. *Cole v. Parkin*, 12 East, 471. *Saltwell v. Loudon*, 5 Taunt. 359. *Trapp v. Spearman*, 3 Esp. 57. *Marson v. Petit*, 1 Campb. 82. *Tidmarsh v. Grover*, 1 Maule & S. 735, and *French v. Nicholson*, 1 Marsh. 72. *Webber v. Maddocks*, 3 Campb. 1. *Peacock v. Murrell*, 2 Stark. 558. *Clark v. Blackstock*, Holt, C. N. P. 474.

(1) *Singleton v. Buttler*, 2 Bos. & Pul. 283. *Johnson v. Duke of Marlborough*, 2 Stark. 313. *Bul. N. P.* 255.

(2) As to admission of such evidence in deeds, see *Phillips on Evid.* 5 ed. 554. *Mease v. Mease*, Cowp. 47. *Fitzgibbon*, 75. *Countess of Rutland's case*, 5 Rep. 26. *Buckler v. Millerd*, 2 Ventr. 107. *Tinney v. Tinney*, 3 Atk. 8. 1 Wils. 34. *Haynes v. Hare*, 1 Hen. Bla. 659. *Clifton v. Walmsley*, 5 T. R. 567. *Webb v. Plummer*, 2 Barn. & Ald. 746. *Doe Spicer v. Lea*, 11 East, 312. *Sellers v. Pickford*, 8 Taunt. 31. The courts will not amend deeds, 6 Taunt. 147.

In *policies of insurance*, charter-parties, 1 Phillips, 561. *Kaines v. Knightly*, Skin. 54. S. C. referred to in *Bates v. Grabham*, 2 Salk. 444. but mistated. *Weston v. Emes*, 1 Taunt. 115. *Uhde v. Walters*, 3 Campb. 16. *Leslie v. De la Torre*, cited 12 East, 583.

Promissory notes and bills of cash, *Chitty on Bills*, 6 ed. 47. 372. *Hoare v. Graham*, 3 Campb. 57. *Hogg v. Snaith*, 1 Taunt. 347. *Rawson v. Walker*, 1 Stark. N. P. C. 361. *Woodbridge v. Spooner*, 3 Barn. & Ald. 233. *Tree v. Hawkins*, 1 Moore Rep. C. P. 535. 8 Taunt. 92. S. C. *Campbell v. Hodgson*, 1 Gow. 74.

Other instruments, ante. *Phillips*, 562, 3, 6, 8. *White v. Wilson*, 2 Bos. & Pul. 116. 2 Atk. 383. *Sayer*, 189. 2 Bro. Ch. C. 219. 7 Ves. 218. 5 Rep. 26. *Greaves v. Ashlin*, 3 Campb. 426. *Jeffery v. Walton*, 1 Stark. 267. *Ingram v. Lea*, 2 Campb. 521. *Robinson v. McDonnell*, 2 Barn. & Ald. 134. *Ramsbottom v. Gosden*, 1 Ves. & B. 165. *Chuan v. Cooke*, 1 Sch. & Lef. 38, 9. *Lord Gordon v. Marquis of Hertford*, 2 Maddock, 106.

(3) *Phillips on Ev.* 5 ed. 566. *Binstead v. Coleman*, Bunb. 65.

However, if it were not necessary (as in cases affected by the statute of frauds) in the first instance to have the bargain reduced into writing, evidence of conversations subsequent to the time of making the agreement would probably be admitted, to shew that the parties agreed afterwards to vary the contract, or add some new stipulation. Here the written agreement, so far as it purports to express the true meaning of the parties, that is, down to the time of its being concluded, is not in any manner contradicted or impugned; but from the proposed evidence it would appear that they afterwards varied or added to the contract, which is not inconsistent with any thing contained in the original agreement (1): as in case of a contract to deliver bacon on particular days, parol evidence of a subsequent agreement as to the extension of the time of delivery of the bacon is admissible (2). And parol evidence will be allowed to explain an indefinite or immaterial expression, or the intention of the parties, when not clearly apparent on the face of the instrument, provided the evidence is not inconsistent therewith. (3)

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Parol evidence will always be allowed to contradict the terms and circumstances under which a contract was entered into, though contrary to what is expressed in the instrument, where the consideration or stipulation has been *illegal*, as for simony,

Parteriche v. Powlett, 2 Atk. 383.
 Meres v. Ansell, 3 Wils. 275.
 Wain v. Walters, 5 East, 10.
 Hope v. Atkins, 1 Price, 143.
 Bartlett v. Pickersgill, 1 Cox's Ch. C. 15.
 Preston v. Merceau, 2 Blak. 1249.
 Rich v. Jackson, 4 Bro. Ch. C. 515.
 6 Ves. 334 n.
 S. C. Gunnis v. Erbart, 1 Hen. Bla. 289.
 Jenkinson v. Pepys, cited 6 Ves. 330.
 Higginson v. Clowes, 15 Ves. 516.
 1 Ves. & B. 524.
 Winch v. Winchester, 1 Ves. & B. 378.
 Ogilvie v. Foljambe, 3 Mer. 53.
 2 Mad. 106.
 Powell v. Edmunds, 12 East. 6.
 Warren v. Stagg, 3 T. R. 591.
 Cuff v. Penn, 1 Maule & S. 21.
 Wilson v. Hart, 7 Taunt. 295.
 1 Moore, 45. S. C.

Lef. 35.

(2) 1 Maule & S. 21.

(1) Phillips, 5 ed. 569. Parteriche v. Powlett, 2 Atk. 384.
 Clinau v. Cooke, 1 Scholes &

(3) See ante as to construction, 2 Rol. Abr. 786. n. pl. 1. Mildmay's case, 1 Rep. 176. Lord Cromwell's case, 2 Rep. 76. Bedell's case, 7 Rep. 38. 2 Dyer, 146 a. Vernon's case, 4 Rep. 3. S. P.; and see King v. Langdon, 8 T. R. 379. Craythorne v. Swinburne, 14 Ves. 170. Peacock v. Monk, 1 Ves. 128. Rex v. Scammonden, 3 T. R. 474. cited in Rich v. Jackson, 6 Ves. 337. n. Goddard's case, 2 Rep. 4 b. Stone v. Bale, 3 Lev. 348. Hall v. Cazenove, 4 East, 477. White v. Sayer, Palm. 211. Wigglesworth v. Dallison, 1 Dougl. 201. Senior v. Armitage, Holt, C. N. P. 196. Jeffery v. Walton, 1 Stark. 267. 14 East, 544. Coke v. Brummell, 2 Moore's Rep. 495.

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How a contract may be cancelled or annulled.

usury, compounding felony, &c. (1); and where fraud is imputed, the party who complains of the fraud may prove any circumstance, however contrary to the statement in the instrument, to shew the fraudulent nature of the transaction. (2)

A contract before breach may be cancelled or annulled either in whole or in part by the mutual agreement (either express or implied) of all the parties to the bargain (3), but not so as to affect the rights of third persons (4); but it must be done with the assent of all parties, unless, as it frequently happens, the original agreement was subject to a condition of which one of the parties alone can take advantage, and in such cases it is in his power to rescind the contract without the concurrence of the other contracting party, as in the case of a sale of goods, conditioned that they might be returned, if the seller did not like them, &c. (5). Or in case of breach of a covenant of which the landlord alone can take advantage (6). And in case of sales by auction, the contract is not complete till the hammer has been knocked down, and before that time a bidder may always retract his bidding (7). The obligation to perform a contract may also be rescinded or discharged by the wrongful act of the party in whose favour it was to have been performed, as where the performance of one party is made to depend upon a certain standard or measure which the other destroyed, and so rendered an estimate impracticable, the former is thereby discharged (8). And a simple contract may be rescinded or discharged by the negligence or default of the other party to perform his part of the contract, at the option of the party for whom the performance should have been made,

(1) See ante, *Buckler v. Milford*, 2 Vent. 167. *Collins v. Blantern*, 2 Wils. 347.; and fraud will avoid a deed if both parties are not implicated, ante. *Roberts v. Roberts*, 2 Barn. & Ald. 370.

(2) Bull. N. P. 173. 2 Barn. & Ald. 370. *Filmer v. Gott*, 4 Bro. Parl. C. 234. 2 ed. *Rex v. Mattingley*, 2 T. R. 12. *Rex v. Olney*, 1 Maule & S. 387. *Small v. Allen*, 8 T. R. 147. *Phillips on Evid.* 5 ed. 558. *Clarkson v. Hanway*, 2 P. Wms. 203. 2 Schvales & Lef. 501.

(3) See Long on Contracts of Sale, 135.

(4) *Pleasant v. Benon*, 14 East, 234. *Bac. Max.* 91. 1 *Powell on Contracts*, 412 to 451. *Smith v. Field*, 5 T. R. 462. 2 East, 121. 2 Bos. & Pul. 457. 3 Bos. & Pul. 122. *Barnes v. Freeland*, 6 T. R. 80. *Salt v. Field*, 5 T. R. 211.

(5) *Towers v. Barrett*, 1 T. R. 133. *Weston v. Downes*, Dougl. 23. *Cooke v. Murston*, 1 New Rep. 351.; and see *Ellis v. Mortimer*, 1 New Rep. 257.

(6) 4 Bar. & Ald. 401.

(7) *Payne v. Cave*, 3 T. R. 148.

(8) 2 Taunt. 150. *Knatchbull v. Grueber*, 3 Merivall, 124.

as where the performance of one contracting party depends upon the other's performance of an act, as furnishing materials, for which no time is limited, the former may abandon the contract in case of unreasonable delay (1); or by partial failure in the consideration, as where goods do not answer the sample, they may be returned to the vendor, or notice thereof given if they be bulky (2). And if a contract of sale is concluded by the payment of earnest, and the purchaser on the commodity being tendered refuses to receive it, whereupon the seller requests him to sell it for him, which he agrees to do, this amounts to a waiver of the original contract (3); and if no such request be made, and the seller take the commodity back again, it seems that he may avoid the contract, and the seller in a reasonable time afterwards is allowed to sell it to another person. (4)

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The party, however, who would rescind the contract must, in all cases, do so within a reasonable time (5). Where a horse is sold with a month's trial, the vendee may rescind the contract at the end of the month, though in the interim he was desired by the vendor to return him on his saying he disliked the price (6). And where goods are sold in the city of London by a broker to be paid for by a bill of exchange, the seller has a right to cancel the contract within a reasonable time, if he is not satisfied with the sufficiency of the buyer (7). But to rescind a contract, and treat it as wholly determined, both parties must be placed in the same situation as they were before the contract was made; and therefore, where the party wishing to put an end to the contract has derived any benefit from it to the detriment of the other party, he cannot rescind it so as to treat it as wholly determined (8). There are, however, some cases where the parties need

(1) 2 Taunt. 325. n.

(2) See post.

(3) Gomery v. Bond, 3 Maule & S. 378.

(4) Langfort v. Administratrix of Tyler, 1 Salk. 113. Hinde v. Whitehouse, 7 East, 571. Giles v. Edward, 7 T. R. 181. acc. Greaves v. Ashlin, 3 Campb. 426. Semb. cont.

(5) Dr. Compton's case, 1 T.R. 136. Fisher v. Samuda, 1 Campb. 190. 193. Hopkins v. Appleby,

1 Stark. 477. Okell v. Smith, 1 Stark. 107. Langfort v. Administratrix of Tyler, 1 Salk. 113. Hinde v. Whitehouse, 7 East, 571. Adam v. Whitehouse, 573. Rowe v. Osborne, 1 Stark. 140.

(6) Ellis v. Mortimer, 1 New Rep. 257.

(7) Hodgson v. Davies, 2 Campb. 530.

(8) Hunt v. Silk, 5 East, 45. Giles v. Edwards, 7 T. R. 181. Salmon v. Watson, 4 Moore, 73

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not be placed in such situation; as where a party under an agreement to purchase some premises took possession of them, and the vendor before the sale was complete turned him out, there a court of equity held that the vendee was not bound to complete the agreement (1). And if a party rescinds a contract by reason of the total non-performance of it by the other party, he may recover back any money he may have paid under it, provided he has done nothing which can be considered as an execution of his part of the contract (2). And if money be paid on a consideration which happens to fail, it may be recovered back as money had and received (3): as if money be paid for the future maintenance of a bastard child not born, in the event of its death, and the payee incurring no expence, the money may be recovered back. (4)

How a contract may be discharged by accord and satisfaction.

The obligation to perform a parol contract may be rescinded or satisfied by the accord of both parties after breach, and satisfaction made in pursuance of such accord. A specialty before broken cannot be *rescinded* or varied, except by matter of as high a nature, and not by any accord or matter *in pais*: as a covenant or bond to pay a sum certain, or not to assign a lease, or not to open a shop within a certain distance of plaintiff's; for here the duty which is certain takes its essence and operation originally and solely by the writing under seal, and it must be avoided by matter of as high a nature, although the duty be merely in the personalty (5). But a deed after the performance of it has been neglected, and where no certain duty accrues by the deed, but a wrong or subsequent default, together with the

Morphett v. Jones, 1 Wils. 100.

Langfort v. Administratrix of

Tyler, 1 Salk. 113. Greaves v.

Ashlin, 3 Campb. 426.

(1) Knatchbull v. Grueher, 3 Mer. 124.

(2) Giles v. Edwards, 7 T. R. 181. Hunt v. Silk, 5 East, 449.

2 Burr. 1012.

(3) 2 Burr. 1012. Watkins v.

Hewlett, 3 Moore, 211. Town-

son v. Wilson, 1 Campb. 396.

Stainforth v. Staggs, 1 Campb.

398. n. Rex v. Martin, 2 Campb.

268. Cole v. Gower, 6 East, 110.

Middleham v. Bellamy, 1 Maule

& S. 310.

(4) Watkins v. Hewlett, 3

Moore, 211.

(5) Rogers v. Payne, 2 Wils.

276. S. C. Bull. N. P. 112. 6 Co.

44. Roberts v. Stoker, Palmer,

110. Sellers v. Brickford, 8 Taunt.

31. Braddick v. Thompson, 8

East, 344. Kaye v. Waghorne,

1 Taunt. 428. Thompson v.

Brown, 7 Taunt. 656. 1 Moore,

358. S. C. Doe Gregson v. Har-

rison, 2 T. R. 425. Fortescue v.

Blagrave, Styles, 8. Blenner-

hasset v. Pierson, 3 Lev. 234.

Hayford v. Andrew, Cro. Eliz. 697.

deed, gives an action to recover damages which are only in the personalty for such wrong or default; accord with satisfaction without deed, is a good plea, for there the satisfaction is of the breach and not of the bond, as in a bond with a condition (1). So in a covenant against an assignee for not repairing a house, the defendant was allowed to give in evidence an accord between him and plaintiff, and execution thereof in satisfaction of the want of repairs (2). The mere consent of a party to accept a satisfaction, without an actual satisfaction, is not sufficient, the accord and satisfaction must be perfect, complete, and executed; for were it otherwise it would be only substituting one cause of action for another, which might go on to any extent; and even a performance of part in pursuance of such consent, and an offer to perform the rest, is not enough (3). The satisfaction must be a reasonable one, and the acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a *similar* security for a greater, and the mere agreement to accept an unreasonable satisfaction will not alter the case: as if a man be indebted to another in £15, it can be no reasonable satisfaction for the other to receive only £5 (4). In the case of a bond, indeed, another bond has never been allowed to be given in evidence as a satisfaction without a bettering of the plaintiff's case (5). The reasonable terms of the satisfaction must indeed always depend upon the particular circumstances under which it is made; and cases frequently occur, as in insolvency, where the payment of a less sum than the original demand, according to an agreement with other creditors, has been held a good satisfaction of such demand (6). And satisfaction must be made to the whole of the original demand; and a party will not be discharged upon performance of a satisfaction to part of such de-

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(1) Anon. Cro. Eliz. 46. Com. Dig. Accord, A 1. Preston v. Christmas, 2 Wils. 86. 426. Fitch v. Sutton, 5 East's Rep. 230. Crauley v. Hillary, 2 Maule & S. 122.

(2) Blake's case, 6 Rep. 43 b. (5) Manhood v. Crick, Cro. Eliz. 716. Cro. Car. 85. Lovelace v. Cocket, Hob. 68, 69. S. P. Lynn v. Bruce, 2 Hen. Bla. 317. Preston v. Christmas, 2 Wils. 86.

(3) Peytoe's case, 9 Rep. 79 b. (6) Cro. Eliz. 716. Hob. 68, 9. Cro. Car. 85. Pinner's case, 5 Rep. 117 a. Kearslake v. Morgan, 5 T. R. 513. Boothbey v. Sowden, 3 Campb. N. P. 175. Knight v. Cox, Bull. N. P. 153. 11 East, 390. 2 M. & S. 120.

(4) Cumber v. Warre, Strange,

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mand, the residue remaining unperformed (1) : but accord with satisfaction by one defendant and copartner, is a bar to any action against the other partners. (2)

When a bond or other security under seal, or of record, has been accepted in satisfaction of a simple contract, then the latter is merged in such higher security, and no action can be supported for the non-performance of the simple contract (3) ; unless such new security be void on account of usury, &c. (4) ; or under the annuity act, &c., in which cases the party may proceed on the simple contract if valid (5). The taking a *collateral* security of an higher nature, not intended to merge the inferior one, does not preclude the creditor from suing on the first contract, though judgment may have been obtained on such collateral security. (6)

How a contract may be discharged by release.

A deed cannot be released or discharged, unless by an instrument of the same or a higher nature, or by operation of law, and this rule holds either before or after breach (7) ; but a simple contract may, previously to the breach of it, be released or discharged by the parol consent of both parties, but after breach, if the party for whom the contract was to have been performed does not rescind it, but insists on the performance, the other party cannot be released or discharged from the performance of the contract, unless by operation of law or by deed, as a release under seal, which merges the simple contract in it (8). Bills of

(1) Walker v. Seaborne, 1 Taunt. 526. 5 East, 230.

(2) 9 Rep. 79 b.

(3) Cro. Car. 415. Bac. Abr. Debt. G.

(4) 1 Saund. 295 a. Cro. Eliz. 20. 6 East, 241. Bull. N. P. 182. Co. Lit. 172. Cro. Eliz. 920. Stra. 1042.

(5) 1 Saund. 295 a. Cro. Eliz. 20. 6 East, 241.

(6) 2 Leon. 110. 6 T.R. 176, 7. Braddich v. Thompson, 8 East, 344. 3 East, 251.

(7) Braddich v. Thompson, 8 East, 344. Sellers v. Bickford, 8 Taunt. 31. 1 Moore, 460. S. C. Thompson v. Brown, 1 Moore, 358. 7 Taunt. 656. S. C. Cord-

went v. Hunt, 2 Moore, 660. Littler v. Holland, 3 T. R. 590. Doe Gregson v. Harrison, 2 T. R. 425. Fortescue v. Brograve, Styles, 8. Blennerhasset v. Pier- son, 3 Lev. 234. Haybord v. Andrews, Cro. Eliz. 697.

(8) Fitch v. Sutton, 5 East, 230. Rozal v. Lampen, 2 Mod. 43. Edwards v. Weeks, id. 259. Langden v. Stokes, Cro. Car. 383. May v. King, Cases K. B. 538. Vin. Abr. tit. Release. Com. Dig. tit. Pleader. 2 G. 13 et tit. Action on the Case in Assumpsit, G. Heathcote v. Crookshanks, 2 T. R. 24. Kearslake v. Morgan, 5 T. R. 514. Lovat v. Parsons, Cowp. 61.

exchange however are excepted from this rule, and a party may be released by the express verbal assent of the holder (1); a release may be made to a part of a claim, without discharging the remainder (2); and if there are two or more obligees, a release by one will be a bar to all (3); so if there are two or more obligors, a release to one is good for the other, whether the bond be joint (4), or joint and several (5), for there is but one duty extending to all the obligors, and therefore a discharge of one is a discharge of all.

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A release by operation of law is where the right and obligation unite, as if a feme obligee take the obligor to husband, this is a release in law (6); so if there be two femes obligees, and the one takes the debtor to husband (7); and again, if two be bound in an obligation to a feme sole, and she takes one of them to husband, and the other dies, the wife shall not have an action against the obligor (8). And where the obligee in a joint and several bond, made one of two obligors his executor, who administered and died, it was holden (9), that the surviving obligor was discharged; for a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged; so where the obligee in a joint and several bond, made one of two obligors his executor with others (10), and the obligor administered himself, it was holden, that the action was discharged as to all the obligors. But if A. and B. are jointly and severally bound in an obligation to C., and A. makes C. and D. his executors, C. refuses, and D. administers, and afterwards C. makes D. his executor, D. as executor of C. may maintain an action on the bond against B. (11); for when the obligor makes the obligee and another executors, and the obligee refuses, the debt is not released or discharged, and the obligee or his executor may sue for the debt, but it is otherwise, if the obligee administers (12). So a guarantee is dis-

(1) Clutton on Bills, 189, and notes.

(2) 2 Rol. Abr. 413.

(3) 2 Rol. Abr. 410. l. 47. Bayley v. Lloyd, 7 Mod. 250.

(4) 2 Rol. Abr. 412. G. pl. 4.

(5) Id. pl. 5. 1 Inst. 232 a.

(6) 1 Inst. 264 b.

(7) 1 Id. ibid.

(8) 21 H. 7. 30.

(9) *Dorchester v. Webb*, Sir W. Jones, 345. 3d resolution.

(10) *Cheetham v. Ward*, 1 Bos. & Pul. 630.

(11) *Dorchester v. Webb*, Sir W. Jones, 345. *Rawlinson v. Shaw*,

3 T. R. 557.

(12) Id. ibid.

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charged, if party guaranteeing third person becomes his partner (1); where there is no obligation there can be no right, and this operation of law will not then take effect, as where a man on the day of his marriage gave a bond to the woman to whom he was to be married, by which he stipulated, that his representatives should, within twelve months after his death, pay to his widow or her representatives a sum of money, and the marriage took place, and afterwards the husband died, whereupon the widow brought an action against the representatives of the husband on the bond, and it was holden that the marriage did not operate as a release of the debt, the bond not being payable during the lifetime of the obligor, nor until twelve months after his death (2). A covenant not to sue will not operate as a release in its own nature, but only by construction to avoid circuitry of action (3); hence, if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor (4). And where a bond was conditioned that the obligor should indemnify the obligee from all sums of money the latter should pay on the account of the obligor, before the execution of the bond the following memorandum was indorsed on it, viz. that the obligee *hath* given an undertaking not to sue upon the bond, until after the obligor's death; it was holden that the memorandum was to be taken as part of the condition, and consequently that the bond was payable only by the representative of the obligor after his death. (5)

How obligation
to perform a
contract may be
discharged by
interference of
legislature.

Contracts may also be annulled by the subsequent act of the legislature, but if the interference of the legislature extend no further than to make a part of the thing contracted for illegal, the agreement will continue to be binding as to the residue, and a court of equity will enforce the performance of it. (6)

(1) 2 Moore, 393.

(2) 5 T. R. 381.

(3) *Dean v. Newhall*, 8 T. R. 168.

(4) *Id. ibid.* *Hutton v. Eyre*, 6 Taunt. 288. 1 Selw. N. P. 561, and note 38. *Fitzgerald v. Traut*, 11 Mod. 254. *Lacy v. Kynaston*, Holt's Rep. 178. 1 Ld. Raym. 690. 12 Mod. 551. 1 Rol. Abr.

939 l. pl. 2.

(5) *Burgh v. Preston*, 8 T. R. 483.

(6) 8 Mod. 51. 5 Bro. P. C. 269. 2 P. Wms. 218. 2 Eq. Ca. Ab. 26. Ca. Chanc. 66. and 3 Bro. P. C. 389.; as to suspension of contracts by interference of legislature, or act of God, &c. see ante.

A party may be excused the performance of a contract, either where the consideration for his performance is illegal or defective, or has totally or partially failed. We have before considered, what amounts to an illegal or a defective consideration (1). There appears a distinction relative to the excuse of performance of contracts void by statute, and those void by the common law. If a statute renders void a deed or contract, (either by express words or impliedly, as where it imposes a penalty on a party entering into it, but not expressly saying the contract shall be void) (2), the performance of every part thereof is excused, for the law must receive its full operation and avoid the whole; but at common law, where the several parts of an agreement are in their nature distinct and divisible, only so much as is unlawful will be rejected, and the rest must be performed (3). But at common law, where the condition of a bond or a contract is entire and incapable of separation, and the whole be against law, it is void, and no part should be performed. (4)

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How far illegality in or failure of consideration will excuse the performance of a contract.

Illegality of contract.

Where one party's performance of a contract depends upon the other's performance, which the latter neglects and wholly fails in, then there can be no doubt but from the nature of the contract the former is excused the performance till the latter complies with the terms of the contract (5); and this rule appears the same at law, where the party only partially performs the contract for the performance of a particular and one entire act, for it is a rule of law that an entire contract cannot be apportioned. Therefore the delivery of part of a commodity sold under a sale of the entire commodity, as in the case of the sale of an engine

Failure of consideration, and non-performance by the other party.

(1) Ante, 78 to 103.

(2) *Bensley v. Bignold*, 5 Barn. & Ald. ante. 84.

(3) Ante, 86. *Newman v. Newman*, 4 Maule & S. 66. 1 Saund. 66 (a) note 1. 2 Bro. C. P. 381. *R. v. Yale*, S. C. 5 Vin. 99. pl. 9. MSS. 2 Ld. Raym. 1459. *Chesman v. Nainby*, Hob. 14. *Norton v. Sims*, S. C. Mod. 856, 7. pl. 1175. 3 Rep. 83 a. *Twyne's case*, and *Mordel v. Middleton*, 1 Vent. 237. *Salmon v. Watson*, 4 Moore's Rep. 73. 11 Rep. 27 b. 2 Burr. 1077. 1082. 1 Campb. 347. *Ledger v. Emes, Peake*,

C. N. P. 216. *Wiffen v. Robert*, 1 Esp. C. N. P. 261. *Fleming v. Simpson*, 1 Campb. 40. n. *Robinson v. Bland*, 2 Burr. 1077. 1 Black. 234. *Petrie v. Hannay*, 3 T. R. 418. *Gaskell v. King*, 11 East, 165. *Bigg v. Shuttleworth*, 13 East, 87. *Howe v. Synges*, 15 East, 440. *Readshaw v. Balders*, 4 Taunt. 57. *Fuller v. Abbott*, 4 Taunt. 105.

• (4) *Id. ibid.*

(5) See *Knatchbull v. Grueber*, 3 Mer. 137. where the *strictest* performance is held necessary.

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where the seller only delivers a part, as the wheels, &c., does not vest a right of action in the seller for the price, before the delivery of the residue (1). And if a man contract to build a house for a certain sum, the mere putting together a quantity of brick and timber in the shape of a house which should fall down the next day, he cannot be said to have done the stipulated work according to his contract, and that he has a right to the sum agreed upon. (2)

But it seems that though a partial failure of the consideration of an entire contract should take place, so as in the first instance to excuse the performance of the other party's contract; yet if the latter accepts any benefit whatever from the consideration in part performed, or in anywise acquiesces in and sanctions the non-performance of the residue of the consideration, he will not be excused the performance of his contract, though the other party may have subjected himself to liability to a cross action for the non-performance of such remainder of the consideration. Therefore, if the consignee of goods accepts any benefit by the carriage, he cannot defend himself for the payment of freight, on the ground that the goods have been damaged by the master in carrying them, although the damage exceed the amount of the freight (3). So, if several articles be purchased as an entire bargain, and the vendor only delivers a part, and the purchaser accepts such part, he must pay for the same, and bring his cross action for non-delivery of the residue (4). And if a man contract to erect a building according to a specific model, and erects a building varying from the plan, he could not recover for the work bestowed therein; but if the party for whom the building was to be erected stood by and saw the work proceeding, it would be considered as an acquiescence on his part to pay for

(1) Waddington v. Oliver, 2 New Rep. 61. Walker v. Dixon, 2 Stark. 281. Symonds v. Carr, 2 Campb. 361.

(2) Ellis v. Hamlin, 3 Taunt. 52. and per Le Blanc, J. in 7 East, 485.; and see Liddard v. Lopes, 10 East, 526. 530.

(3) Shields v. Davis, 6 Taunt. 65. Farnsworth v. Garrard, 1 Campb. 38. 190. Tye v. Gwynne, 2 Campb. 347. 4 Campb. 119. 3 Campb. 451. Temple v.

M'Lachlan, 2 Bos. & Pul. 136. Dickson v. Clifton, 2 Wilson, 319. Champion v. Short, 1 Campb. 53. Waddington v. Oliver, 2 Bos. & Pul. 61. 2 Taunt. 2. 14 East, 486. Duffet v. James, Cormack v. Gillis, Morgan v. Richardson, cited in 7 East, 480, 1, 2. 1 Campb. 40. n. Solomon v. Turner, 1 Stark. 51. Burn v. Miller, 4 Taunt. 745.

(4) 1 Campb. 38, 190.

the work (1). So, if a party is desirous to rescind the contract on account of the failure of the consideration, he must do so within a reasonable time after such failure comes to his knowledge, and this should be done by giving notice to the other party of the objection; or, in the case of goods sold not answering the quality contracted for, by either returning the goods, or, if bulky, by giving notice to the vendor (2). And a jury will determine, from the particular circumstances of the case, what is a reasonable time (3). Unless such notice or return of the goods be made, and there be no express warranty, the vendee will be without remedy for the non-performance of the vendor's part of the contract (4). And though a party do receive a benefit from the performance of part of the consideration of an entire contract, and there be a failure as to the residue; thereby, as we have seen, subjecting him to the performance of his part of the contract, yet if he give the other contracting party notice that he objects to such failure of the consideration, he will only be liable to perform so much of his contract as will be considered an adequate remuneration to the other for the part he has performed (5). And it seems that this rule will hold where no notice is given, if the consideration be *totally* different from that agreed to be performed (6), or the plaintiff seeks to recover upon a *quantum meruit* (7). And in an action for the non-performance of a contract, where there has been a partial failure of the consideration for the performance, the defendant should object thereto on the ground of such failure, either in bar of the action, or to reduce the damages, otherwise he would be prevented from bringing a cross action against the plaintiff for the non-performance of his part of the contract. (8)

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(1) *Supra*, note.

(2) *Power v. Wells*, Cowp. 818. Dougl. 23. *Giles v. Edwards*, 7 T. R. 181. *Hunt v. Silk*, 5 East, 449. *Cooke v. Munstone*, 1 New Rep. 351. *Towers v. Barrett*, 1 T. R. 136. *Fisher v. Samuda*, 1 Campb. 190. *Rowe v. Osborne*, 1 Stark. 140. *Kist v. Atkinson*, 2 Campb. 193. 4 Esp. 95, 6. 1 Stark. 107.

(3) *Rowe v. Osborne*, 1 Stark. 140. *Otrell v. Smith*, 1 Stark. 108. 1 Salk. 113.

(4) *Vide note* (2).

(5) *Id. ibid.* *Basten v. Butler*, 7 East, 484. *Denew v. Deverell*, 3 Campb. 451.

(6) *Basten v. Butler*, 7 East, 484. *Farnsworth v. Garrard*, 1 Campb. 38. *Temple v. McLaughlan*, 2 New Rep. 136.

(7) *Basten v. Butler*, 7 East, 484. *Otrell v. Smith*, 1 Stark. 107. *Kist v. Atkinson*, 2 Campb. 63. *Fisher v. Samuda*, 1 Campb. 190. *Farnsworth v. Garrard*, *id.* 38. *Denew v. Deverell*, 3 Campb. 451.

(8) *Fisher v. Samuda*, 1 Campb.

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When excused performance by impracticability.

Where there is a partial failure as to the consideration, courts of equity will in some cases relieve a party from the performance of the residue, so as to entitle him to the full benefit of the contract, by compelling the other party to take a compensation in lieu of such performance of the residue. (1)

We have seen that where the *law* creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any inevitable accident, because he might have provided against it by his contract (2), and in the latter case he will be liable in damages for the non-performance of it; as where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessels arriving at Falmouth in the course of her voyage an embargo was laid on her, "until the further order of council," it was held that such embargo only suspended, but did not dissolve the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract, for they ought to have provided against it (3). A freighter who covenants generally to load a cargo, and is prevented from so doing by the prevalence of the plague, is liable on his covenant, though the performance of it be necessarily suspended (4). And if a man, for a valuable consideration, undertake to do an impossible or improbable act, an action will nevertheless lie against him for the non-performance. (5)

190. Temple v. McLauchlan, 2 New Rep. 141. Kist v. Atkinson, 2 Campb. 63.

(1) See Knatchbull v. Grueber, 3 Mer. 140. 1 Maddox, 153.

(2) Ante 100. De Silvale v. Kendall, 4 Maule & S. 37. Paradine v. Jane, Aley, 27. Beale v. Thompson, 3 Bos. & Pul. 420. Atkinson v. Ritchie, 10 East, 533. Dyer, 33 a. E. 20. and 29 H. 8. C. B. Monk v. Cooper, Stra. 763. 2 Ld. Raym. 1477. S. C. 1 T. R. 310. 2 Rep. Temp. North, 219. Amb. 619. 3 Anstr. 687. 18 Ves. jun. 115. 3 Anstr. 687.

Com. Rep. 627. 6 T. R. 650. 4 East, 42. 546. Barker v. Hodgson, 3 Maule & S. 267. 5 T. R. 215. 242. 2 Campb. 6. 2 Hen. Bla. 501.

(3) Hadley v. Clarke, 8 T. R. 259.; see Toulay v. Hubbard, 3 Bos. & Pul. 291. 4 East, 42. 546.

(4) Barker v. Hodson, 3 Maule & S. 267.

(5) Thornborough v. Whitaker, 2 Ld. Raym. 1164. 6 Mod. 305. 3 Salk. 97. 1 Vent. 269. 1 Wils. 295. 1 Lev. 111. 2 Keb. 569. Ante 100.

When there has been a *fraud* committed upon either of the contracting parties, or of third persons, courts of law as well as equity will relieve a party in the performance of the contract (1); and even in records, deeds, and other specialties, parol evidence will be admitted to shew their invalidity through a fraudulent transaction (2); but the objection must come from a person neither party nor privy to the fraud, for no person can alledge his own fraud in order to invalidate his own deed (3); but fraud will constitute an objection, though it was committed by an agent for his principal, who took no part in it, as the latter is civilly responsible for the acts of the former (4). It is a rule that no part of a *fraudulent* transaction can be supported, except where a consideration has been given, in consequence of which the parties cannot be replaced in the same situation; in ordinary cases of fraud, the whole transaction is undone, and the parties replaced in their former situation. (5)

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Fraud may be divided into four species: 1. Actual fraud arising from facts and circumstances of imposition. 2. Fraud which is apparent from the intrinsic nature and subject of the bargain itself. 3. Such as arises from the circumstances and condition of the contracting parties. 4. Such as may be collected from the nature and circumstances of the transaction, as being an imposition on others not parties to the fraudulent agreement (6). The *first* branch of this division comprizes those instances of fraud which arise from *a statement of falsehood, or a fraudulent device to conceal the truth*, for it is a rule that each of the contracting parties, if he make any warranty or representation, is bound to disclose faithfully to the other all the material circumstances within his knowledge respecting the subject matter of the contract, and relating to such warranty and representation; and if this be omitted, either from design, neglect, or accident, the contract is invalid (7): as where the seller of an estate

(1) 1 P Wms. 239. 2 Ves. 155.
2 Bla. Com. 309. Cockshot v. Bennett, 2 T. R. 1 Campb. 340.
1 Taunt. 381. Cowp. 37. 3 Ves. & B. 42.

(2) 3 Ves. & B. 42.

(3) Hawes v. Leader, Cro. Jac. 270. Yelv. 196. S. C. Roberts v. Roberts, 2 Barn. & Ald. 367. Montefiori v. Montefiori, 1 Black. 363. 3 Ves. & B. 42.

(4) Doe Willis v. Martin, 4 T. R. 39. Hill v. Gray, 1 Stark. 434. 6 East, 289. 494. 1 Taunt. 289.

(5) Daubeney v. Cockburn, 1 Mer. 643, 4.

(6) Newland on Contracts, 352.

(7) Per Yates, J., 2 Bla. Rep. 465. 2 P. Wms. 170. Dougl. 260. 1 T. R. 12. Skin. 327. Newland on Contracts, 352. 3 Campb. 155.

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grossly misrepresents the value of it to the purchaser, the latter was relieved in equity from the performance of the bargain (1); and it seems that misrepresentation, even in a slight degree, will relieve a party from the performance of a contract (2). Even in chaffering about goods there might be such misrepresentation as would set aside a contract, and particularly when the misrepresentations were made under such circumstances, and in such a way, that they took the confidence of the purchaser, and induced him to act when otherwise he would not (3). Whether the misrepresentations be wilful or not, or of a fact latent or patent (4), such misrepresentations may be used to resist a specific performance of a contract, unless the plaintiff really knew how the fact was (5). But the degree of misrepresentation must be such as would evidently tend to deceive a man of common sense, and if it be vague and indefinite, insomuch that it would naturally induce a purchaser to make enquiries respecting it, there a party would not be excused the performance (6). The misrepresentation need not be in direct terms: it has been held that where goods are put up to sale by public auction, under the usual conditions "that the highest bidder shall be the purchaser," if the owner, or any third party on his behalf, secretly attend the sale, and bid for the goods in order to enhance the price, it is a fraud upon the real bidders, and the sale is therefore void (7): but the present doctrine is that it is lawful for a vendor to employ puffers to keep up the price. (8)

Concealment.

Where one having a doubtful account of his ship at sea, viz. "that a ship described like his had been taken," insured

(1) *Wall v. Stubbs*, 1 Mad. 80.; and see *Buxton v. Lister*, Prec. Ch. 383, and *Williamson v. Joyce*, 3 Ves. 158. *Howard v. Hopkins*, 2 Atk. 371. *Higginson v. Clowes*, 15 Ves. 516. *Ellard v. Lord Landaffe*, 1 Ball & B. 241. *Legge v. Croker*, id. 506. *Broderick v. Broderick*, 1 P. Wms. 239. 2 Eq. Ca. Abr. 244. 4 Vin. Abr. 534. *Jervois v. Duke*, 1 Vern. 19. *Beresford v. Milward*, 2 Atk. 49. *Fletcher v. Bowsher*, 2 Stark. 565. *Western v. Russell*, 3 Ves. & B. 187. *Schneider v. Heath*, 3 Campb. 606.

(2) *Cadman v. Horner*, 18 Ves. 10.

(3) Per Lord Eldon, *Tibbald v. Hill*. Dow's cases, Ho. Lord, 2 vol. 264.

(4) *Wall v. Stubbs*, 1 Mad. 81. *Duke of Norfolk v. Worthy*, 1 Campb. 337. *Loyes v. Rutherford*, Sugd. Vend. & Birch. 245.

(5) *Dyer v. Hargrave*, 10 Ves. 515.

(6) *Trower v. Newcome*, 3 Mer. 1704. *Stewart v. Allison*, 1 Mer. 26.

(7) *Bexwell v. Christie*; Cowp. 395. *Howard v. Castle*, 6 T. R. 642. S. P.; and see *Jackson v. Duchaire*, 3 T. R. 551. 3 Ves. jun. 625.

(8) *Sugden Vend. & P.* ch. 1. 1 to 10. 3 Ves. jun. 625.

her without giving any information to the insurers of what he had heard, the insurers were relieved in equity from the performance of their contract (1). And in one case it was held, that the seller of a ship was bound to disclose to the buyer all latent defects known to him at the time of the sale (2), though that doctrine has since been denied; and where a ship is sold with all faults, and there is no warranty, the vendor is not liable for latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser (3). But where the agent of the vendor of a picture, knowing that the vendee laboured under a delusion with respect to the picture, which materially influenced his judgment, permitted him to make the purchase without removing that delusion, the sale was held void (4). But with respect to concealment, the rule only applies to cases of concealment of material circumstances which are *exclusively* within the knowledge of *one* of the contracting parties, and does not extend to cases of sales where both parties inspect the commodity bargained for, and each exercises his own judgment as to the quality and value, &c., and where no deceit is practised by either party (5); for though a horse, or other commodity, may be defective in some respects, though the vendor must not use any device to conceal the same, yet if he make no warranty, he will not be bound to make compensation to the purchaser on his discovering the defect.

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Under this head of fraud also fall those cases in which a person obtains a deed or other instrument for one purpose, and afterwards applies it to another purpose, or alters it contrary to the original intention of the other party, and without his consent (6). As where the defendant, having advanced several sums of money to the plaintiff towards the support of a suit in which they were jointly interested, took promissory notes from the latter, pro-

(1) *De Costa v. Scandret*, 2 P. Wms. 169.; and see *Kirby v. Smith*, 1 Barn. & Ald. 672. *Coverley v. Burrell*, 5 Barn. & Ald. 257. *Schneider v. Heath*, 3 Campb. 506.

(2) *Mellish v. Motteux, Peake*, Ch. P. 115.

(3) *Baglehole v. Walters*, 3 Camp. 154. *Schneider v. Heath*, *id.* 506. 2 Rol. Rep. 6. 2 Bla. Com. 451. 3 Bla. Com. 166. *Sugden V. & P.* 2.

(4) *Hill v. Gray*, 1 Stark. 435. Vide *Fox v. Macketh*, 2 Bro. C. C. 420. as to where the purchaser suffers vendor to labour under delusion, *post*.

(5) Vide 2 Bla. Com. 451. 3 Bla. Com. 166. *Sugden's Law of Vendors*, 1 to 10. 1 Comyns on Con. 38.; and see *post*.

(6) *Chitty on Bills*, 101, 5, 6.

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misgiving him that no improper use should be made of them, but the defendant having soon afterwards put them in suit against the plaintiff, the court relieved against them. (1)

Other cases are, where the fraud appears from the intrinsic nature and subject of the bargain itself (2). Under this head may be considered those cases where there has been an inadequate consideration for the performance of a contract, and this may be divided into two heads; viz. 1st, that inadequacy of consideration which arises by itself, or, 2d, with reference to the evidence which may be derived from the circumstances of the case. In the first view of the subject it seems clear that mere inadequacy of price is not of itself a ground on which the courts will set aside an agreement, for if a person with his eyes open will make a bad bargain, he must suffer by his own imprudence, and can obtain no relief (3). 2d. But though inadequacy of price when standing by itself be not sufficient to induce a court to relieve a party from the performance of his agreement, yet, when connected with other circumstances, it may tend materially to assist a party in equity in making out a case of fraud; and even when standing alone, if the inadequacy of the consideration be so strong, gross, and manifest, that a man of common sense would start at the bare mention of it, a court of equity will consider it a sufficient proof of fraud to set aside the purchase (4). And if there be such inadequacy, or the bargain be so unconscientious, as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a command over him which may amount to fraud (5). The inadequacy of the con-

(1) *Chennel v. Churchman*, 3 Bro. C. C. 16. in the note. *Bishop of Winchester v. Tournier*, 2 Ves. sen. 445.; and vide *Young v. Peachey*, 2 Atk. 254. *Loyd v. Sandelands*, 1 Gow. 13. *Wilkinson v. Brayfield*, 2 Vern. 307.

(2) See *Newland on Contracts*, 357.

(3) *Griffith v. Spratley*, 2 Bro. C. C. 179. in note. *White v. Damon*, 7 Ves. 30. *Western v. Russell*, 3 Ves. & B. 187. *Moth v. Atwood*, 5 Ves. 845. *Speed v. Phillips*, 3 Anstr. 731. *Fleming*

v. Simpson, 1 Campb. 40. n. 2. *Campb.* 346, 7. *Lewis v. Cosgrave*, 2 Taunt. 2. *Solomon v. Turner*, 1 Stark. 52. *Day v. Newland*, *Newland on Con.* 66.

(4) *Bro. C. C.* 9. Vide Lord Eldon's judgment in *Astley v. Weldon*, 2 Bos. & Pul. 351.; see *Whalley v. Whalley*, 1 Mer. 436.

(5) *Bro. C. C.* 175. 6 Ves. 274. *James v. Oades*, 2 Vern. 402. *Heathcote v. Paynor*, 2 Bro. C. C. 167. *Bowes v. Heaps*, 3 Ves. & B. 117.

sideration must depend upon the nature of the circumstances of each particular case; the mere absence of fraud will not necessarily decide upon the validity of a transaction, and where a bargain is very unconscientious and oppressive, and there are other unfavourable facts attending the case, courts of equity will sometimes relieve (1). And under the same head may be placed those cases where, in a contract for a loan of money, the exorbitancy of the terms is attempted to be concealed by the colour of a sale of goods, and in these cases the borrower will be relieved upon paying the sum which the goods were sold for by him. (2)

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Sometimes the fraud appears from the condition and circumstances of the contracting parties. Under this head will be considered those cases of fraud where advantage has been taken of the weakness of mind, or of the necessities of one of the contracting parties. We have before seen, that mere weakness of understanding in a party giving a bond without any fraud or breach of trust in obtaining it, is not sufficient for a court to relieve a party from the performance of a contract (3). Great weakness of understanding, however, although it does not amount to insanity, if coupled with circumstances of fraud, apparent either from the unconscientious bargain, from the exercise of undue influence, from the want of adequate motive, or the like, is a ground for setting aside an agreement, especially in courts of equity (4). Where a person executed a deed at a

(1) Bowes v. Heaps, 3 Ves. & B. 117. Sir T. Mears's case, cited in Ca. Temp. Tab. 40, and vide 2 Salk. 449. Thornhill v. Evans, 2 Atk. 330. Berney v. Pitt, 2 Ch. Rep. 396. 2 Vern. 14. Gwynne v. Heaton, 1 Bro. C. C. 1. and cases there cited.

(2) Waller v. Dalt, 1 Chan. Ca. 276. Fairfax v. Trigg, Ca. Temp. Finch, 314. Bill v. Price, 1 Vern. 467. Lamplugh v. Smith, 2 Vern. 77. Whitley v. Price, 2 Vern. 78. Barney v. Tyson, 2 Vent. 359. 1 Bro. C. C. 149. 1 Swanston, 329.

(3) Osmond v. Fitzroy, 3 P. Wms. 130. Sherwood v. Sanderson, 19 Ves. 286. Exparte Barnsley, 3

Atk. 168. Lord Donegal's case, 2 Ves. 407.

(4) Fonblanque, Treat. on Eq. 68, 9. Newland on Contr. 362. 7 Bro. P. C. 70. 2 Id. 77. 2 P. Wms. 203. 2 Ves. 627. 2 Atk. 324. Tothill, 101. Taylor v. Obee, 3 Price, 83. Bowes v. Heaps, 3 Ves. & B. 117. Western v. Russell, id. 187. 2 Maddox, 430. Durneage v. White, 1 Wils. Ch. Rep. 67. Griffin v. Devenillo, 3 P. Wms. 130. White v. Small, 2 Chan. Ca. 103. James v. Greaves, 2 P. Wms. 270. Portlington v. Eglington, 2 Vern. 189. 2 Ves. 408. Ridgeway v. Darwin, 8 Ves. 65. B.

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Relief where party binds himself under mistake.

time when his life was despaired of, and but two hours before his death, and it appeared he could not have a mind adequate to the business he was about, and so might the more easily be imposed on, the court of equity relieved against the deed, although there was no proof that he was *non compos*, or delirious, at the time of executing it, and though the deed contained a power of revocation (1). So courts of equity, as well as law, will relieve, in cases where the party bound himself under a contract or instrument contrary to his intention, or under a mistake or misapprehension of rights, and particularly where the party was an illiterate person, although there was no actual fraud (2). And where a person is in the dark with respect to the real value of the property which he sells, and the bargain proceeds on the idea that he is to receive the full value of it, if it turn out afterwards that the property has been undervalued, he will be relieved in some degree from the bargain (3). Where A. agreed to purchase a bar of silver from B., which by mutual agreement was referred to C. to ascertain its weight, who overrated it, it was held that A., on discovering the error, might recover the excess he had paid to him beyond the real weight (4). But the buyer of property is not, from the nature of the contract, in general bound to make any discovery which may tend to his disadvantage in the making of the bargain, as where the bargain is merely that the purchaser shall give a certain price for the property sold, unaccompanied with any stipulation, either express or implied, that he is not to have it for less than its value, the knowledge by the vendee of a circumstance materially enhancing the value of the property, and the known ignorance of it by the vendor, will not affect the validity of the contract. (5)

Money paid under a mistake when recoverable back.

It is a general rule that where a party pays money to another voluntarily, with full knowledge or full means of knowledge of

(1) *Fane v. Duke of Devonshire*, 6 Bro. P. C. 137.

(2) 1 Swanst. 329. *Hawes v. Leader*, Cro. Jac. 27. *Brookbank v. Brookbank*, 1 Eq. Ca. A. 168. 1 Foub. 274. *Proof v. Hines*, Cas. Temp. Talb. 111. *Gould v. Okedon*, 4 Bro. P. C. 198. *Kenrick v. Hudson*, 4 Bro. P. C. 222. *Turner v. Turner*, 2 Ch. Rep. 81. *Bingham v. Bingham*, 1 Ves. 126. *Lansdown v. Lansdown*, *Moseley*,

364. *Gee v. Spencer*, 1 Vern. 32. *Cann v. Cann*, 1 P. Wms. 727. 1 Atk. 10. *Bize v. Dickason*, 1 T. R. 285. *Malcolm v. Fullarton*, 2 T. R. 645.

(3) *Cocking v. Pratt*, 1 Ves. 400. *Grillith v. Trapwell*, 1 Atk. 400.

(4) *Cox v. Prentice*, 3 Maule & S. 344.

(5) *Fox v. Mackreth*, 2 Bro. C. C. 420.; see *Hill v. Gray*, 1 Stark. 435, ante. 157, note 4.

all the facts of the case, the party so paying cannot recover it back again on account of his ignorance of the law (1); but if the payment be made without full knowledge or full means of knowledge of the facts, and much more if the payee suppresses the real circumstances in these cases, the party paying may recover back the money paid (2). And it seems that if money be paid under ignorance of the law, and uncertainty of facts, induced in some measure by the defendant himself, it may in some cases be recovered back (3); as where a sheriff demanded more than his legal fees, and the party paid the demand, it was held he might set off such overpayment (4). And we have seen that courts of law, as well as of equity, will relieve a party from the performance of his contract, where he was intoxicated at the time of entering into it (5); especially if the intoxication were caused by the fraud or contrivance of the other party (6), and the party sought to be charged, was so excessively drunk, that he was utterly deprived of reason or understanding. (7)

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Drunkenness.

Cases occur where the necessity of one of the parties is taken into consideration, and in which a fraudulent use has been made of the necessitous situation of a person, to draw him in to make an unequal contract. The mere circumstance of a party being a distressed man, will not of itself affect the validity of the agreement; but if there appear in the case, any unconscientious and oppressive bargain, or of plain contrivance or management, they will prove that an unfair and fraudulent advantage was taken of the situation of the party, and he will in a court of equity be relieved in some degree from the performance (8). So a party will be excused the performance

Necessitous situation of party.

(1) *Bilbie v. Lumley*, 2 East, 469. *Brisbane v. Dacres*, 5 Taunt. 143. *Martin v. Morgan*, 1 Gow. C. N. P. 123. 3 Moore, 635. S. C. *Stevens v. Lynch*, 12 East, 38. *Gomery v. Bond*, 3 Maule & S. 378. id. 344. *Farmer v. Arundell*, 2 Bla. 824. 2 Brod. & B. 60.

(2) *Bize v. Dickason*, 1 T. R. 285. *Malcolm v. Fullarton*, 2 T. R. 645. *Cox v. Prentice*, 3 Maule & S. 344.

(3) *Dew v. Parsons*, 2 Barn. & Ald. 562. *Chatfield v. Paxton*, 5 Taunt. 471. n.

(4) *Dew v. Parsons*, 2 Barn. & Ald. 562.

(5) Ante 52, 54. 1 Chanc. Ca. 202. Bull. N. P. 172. 18 Ves. 16. 3 Campb. 133.

(6) 3 P. Wms. 130. n. a.

(7) 1 Fonblanque, 68.

(8) *Ardglasse v. Muschamp*, 1 Vern. 237. *Ardglasse v. Pitt*, 1 Vern. 239. *Proof v. Hines*, Ca. Temp. Talb. 111. *Gould v. Oke-den*, 4 Bro. P. C. 198. *Kenrick v. Hudson*, id. 222. *Moses v. McFerlan*, 2 Burr. 1012. *Munt v. Stokes*, 4 T. R. 564. *Irving v. Wilson*, id. 485. Ante 52.

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of a contract, when he was compelled to execute it under *duress* (1). Lastly, all contracts which are in fraud of creditors (2), of *bonâ fide* purchasers (3), and in short of the rights of third persons, are, as we have before seen, void; as where a bargain was apparently made between a vendor and a purchaser for goods at a fixed price, which was so represented to a third person, in order to induce him to guarantee the payment, and there was a private stipulation, concealed from the other party, that a larger sum should be paid for the goods, and it was held that this fraud destroyed the whole bargain (4). It would be impracticable to descend into a minute enquiry as to what will constitute a fraud, in the vast variety of cases which must necessarily arise under this head, and it will perhaps be deemed sufficient to refer to the treatises and works of other authors on this head. (5)

(1) Ante 55.

(2) 13 Eliz. c. 5. 4 East, 1.

(3) 27 Eliz. c. 4.

(4) 3 T. R. 551.

(5) See Newland on Contr. 369

to 431. Long on Personal Property, 64 to 79. Ante, 81. and cases there referred to. Chitty on Bills, 6 ed. 30 to 34. 4 Esp. Rep. 179. 3 T. R. 551.

CHAP. II.

Of the Stamps on written Contracts and Documents.

ALMOST all written contracts are subject to a stamp duty.

The mode of raising a revenue by affixing a stamp to certain judicial and public proceedings, and to deeds and other papers of contract, promise, or authority, owes its origin, in modern Europe at least, to the Dutch, by whom it was adopted about the middle of the seventeenth century. The French soon followed their example, and stamps were first imposed in England in 1671, by statute 22 Charles 2. c. 3. and has since been extended so as to affect almost every transaction of life, whether of law, commerce, contract, travelling, or amusement. During life, stamps are necessary in almost every act and occupation, and after death no inconsiderable share of our property is claimed for stamps or probates, administrations, and legacies. Yet, compared with other taxes, the stamp duties are not in themselves a grievance, they give security to every species of business on which they attach, are easily collected, and not severely felt. Their excess may occasion some apprehensions, but it would seem politic to abrogate a great many other taxes before any material alteration should be proposed in the stamp laws (1). A great inconvenience formerly attended them from the circumstance of their parts being dispersed through a vast number of statutes, and each addition being separately inserted into every stamp, instead of consolidating the whole into one general amount; but by statute 44 Geo. 3. c. 98. this most desirable end was attained, and all the objects of taxation by stamps were brought together under proper heads, and arranged in clear and copious schedules. The 55 Geo. 3. c. 184. is now the principal act regulating stamps (2), and as few written documents can be given in evidence, unless the same be stamped, and some cannot

(1) 1 Bla. Com. 324. Adolphus, Pol. Stat. 112.

(2) See the statute in Appendix, 4th vol.; and see 3 Geo. 4. c. 117. A new act is in contemplation.

be stamped after they have been made, even on payment of a penalty, it is important in this place to consider the terms of the regulations affecting stamps, and the decisions thereon.

The statute 55 Geo. 3. c. 184. enacts, that the duties granted by certain enumerated other acts (1) shall cease from the 31st August 1815, save as to the arrear of such duties; and then provides that the new duties specified in the schedule, subject to such exemptions as are therein expressed, shall from that day be imposed on the different documents mentioned in such schedule. It then provides, that the regulations contained in former acts thereby repealed, and in acts relating to any prior duties of the same kind, shall be applicable to the duties imposed by the present act in all cases not thereby expressly provided for (2); and that instruments having wrong stamps, but of sufficient value, shall be valid, except where the stamp used shall have been specially appropriated to any other instrument, by having its name on the face thereof. It then contains particular provisions relative to the stamps on bills, notes, and checks, bankers probates, &c. and then gives the schedules which regulate the amount of duty on each instrument, and the exemptions. The prior act applicable to and regulating the present duties, provides (3), that no instrument subject to the stamp duty shall be receivable in evidence, or available at law or in equity, until the same has been duly stamped; and the 37 Geo. 3. c. 136. (3) authorizes the commissioners of stamps at their head office, or such officer as they shall appoint elsewhere, to stamp deeds and all other instruments (except bills of exchange, promissory notes or other notes, drafts, or orders) with the proper stamp, on payment of the duty, and a penalty of five pounds if the instrument has already had a stamp of sufficient value, though of the wrong denomination; and if not previously stamped with a stamp of sufficient value, then a £10 penalty is to be paid, besides the proper duty, if the accumulated penalties at the time of passing this act of the 37 Geo. 3. c. 136. would have exceeded £10 (4); and if it shall appear on oath that the proper stamp was omitted, through accident or inadvertency, or from

(1) 48 Geo. 3. c. 149. 44 Geo. 3. c. 98. 50 Geo. 3. c. 35. s. 2.

(2) s. 8.

(3) See also 43 G. 3. c. 127. s. 5.

(4) In practice £5 penalty only is now required.

urgent necessity, or unavoidable circumstances, and without intention to defraud, then, if the instrument be brought to the stamp office within 60 days after it was executed, the penalty may be remitted. The schedules specifying the particular stamps on each instrument being exceedingly long, the reader is referred to the fourth volume, containing the act.

We will now proceed to inquire—

1st. Of the various mercantile instruments which require stamps within the meaning of the first schedule of the above statute, and of such as are exempted therefrom, and herein we will consider,

1st. Those rules and decisions which may govern a party in obtaining a stamp of a proper denomination and value ;

2dly. When several stamps are necessary ;

3dly. Of the effect an alteration in an instrument has upon the stamp.

2dly. Of the necessity of having a proper stamp affixed to an instrument ; and herein,

1st. In what cases parol testimony, or an unstamped writing, may be admitted in evidence ;

2dly. In what cases a stamp is presumed to be correct.

3dly. In what cases and how a defect in the stamping an instrument may be cured.

1st. Of the various mercantile instruments which require stamps within the meaning of the above statutes, and of the exemptions from the stamp duties ; and we shall consider these in the alphabetical order in which they are arranged in the statute ; viz. agreements, bills of exchange, and promissory notes, &c., bonds, policies of insurance, and receipts, &c. observing as a general rule, that the duties are only imposed on such instruments as are made in this country, and have no reference to those made abroad, for where an agreement is made in a foreign country, and is consistent with and valid according to the laws of that country, it is so here, unless there is any express declaration of the legislature to the contrary. As where the plaintiff and defendant being at sea, made a wager in writing upon

Of instruments
made abroad.

the expedition in the performance of a journey of 240 miles in a postchaise; and it being objected that the agreement not being stamped could not be recovered upon, it was answered that the agreement bore date at sea, and, therefore, not being made within this kingdom, a stamp was not required (1). And the same rule holds with respect to foreign bills of exchange, and other instruments made abroad (2) (except promissory notes), which when made out of Great Britain must be stamped as English notes before they are negotiated or paid in Great Britain (3); and where a bill was drawn in Ireland, and blanks were left in it, and was not actually completed and negotiated till it arrived in England, an English stamp was not considered necessary (4). So where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bona fide* holder filled in his own name as payee, it was held an English stamp was not necessary (5); but if a bill be drawn in England, though dated at some foreign place, such bill cannot be enforced here without an English stamp (6). And if an instrument is inadmissible in evidence abroad, it cannot be admitted here (7); but until the law of the foreign country is distinctly proved, it will be presumed that no stamp is necessary. (8)

Stamps or
Agreements.

Agreements in general, whether they relate to real or personal property, are liable to the stamp duties (9); but the legislature seem only to have contemplated those which relate to such matters as are of a pecuniary calculation, and it has therefore been held, that a contract of marriage may be proved by unstamped letters (10). Any writing which would be evidence, though

(1) *Zimenes v. Jaques*, 1 Esp. Rep. 311. *Winbled v. Malmberg*, 1 Esp. Rep. 454.

(2) 7 T. R. 601.

(3) 55 Geo. 3. c. 184. s. 29. containing however an exception in favour of promissory notes made and payable only in Ireland.

(4) *Snaith v. Mingay*, 1 Maule & Sel. 87.

(5) *Crutchley v. Mann*, 5 Taunt. 529. 1 Marsh. 29. S. C.

(6) *Jordaine v. Lashbrooke*, 7 T. R. 601. *Abraham v. Dubois*, 4 Campb. 269.

(7) *Alves v. Hodgson*, 7 T. R. 241. *Clegg v. Levy*, 3 Campb. 166.; but that was the case of a bill made on part of the British territory. In general one country does not regard the revenue law of the other. *Chitty on Bills*, 6 ed. 57.

(8) *Clegg v. Levy*, *supra*.

(9) *Emmerson v. Heelis*, 2 Taunt. 38.

(10) *Orford v. Cole*, 2 Stark. 351. See schedule 55 Geo. 3. c. 184. tit. Agreement, "where the matter of the agreement shall

only part of the contract, must be stamped (1); and a schedule requires a stamp as part of the agreement to which it is annexed (2). But the agreement or minute thereof must be in part complete, and a slip of paper not signed nor required to be signed by either party, handed by an auctioneer to the vendee, describing the premises, term, and rent, on a lease of premises by auction, is not such a minute of the agreement as requires a stamp, unless it is signed by some of the parties, or by the auctioneer, nor is it such a writing as will exclude parol evidence (3); though if it were signed by the auctioneer, and delivered to the bidder, it ought to be stamped (4). So in an action by a broker for commission, a prospectus of plaintiff's terms of doing business, though acted upon, is not evidence of the agreement itself, but is *functus officio*, before the parol contract is entered into, and requires no stamp (5). But where a school-master sought to recover beyond the actual period of schooling, on the ground of removal without notice, according to terms of a prospectus delivered to the defendant, the identical copy of the prospectus delivered to the defendant was held to require a stamp (6). A mere cognovit, being only an acknowledgement of an account without any mutuality, does not require a stamp (7); and for the same reason a mere I. O. U. is admissible in evidence, though unstamped (8). But if there be any thing of agreement beyond the mere authority to sign judgment, then a stamp becomes necessary. Thus where the defendant gave a cognovit to the plaintiff on unstamped paper, by which he agreed to confess that the plaintiff had sustained damage in the action to the amount of £30, and in which it was expressly stipulated that no judgment was to be entered unless the defendant made default

be of the value of £20 or upwards." bain, 2 Stark. 277.

(1) *Ramsbottom v. Mortley*, 2 Maule & S. 445. (4) *Ramsbottom v. Mortley*,

2 Maule & S. 445. (5) *Edgar v. Blick*, 1 Stark. 464.

(6) *Williams v. Stoughton*, 2 Stark. 292.

(7) 1 Esp. 426. 2 Bos. & Pul.

(2) *Lake v. Ashwell*, 3 East, 150, 1. 1 Campb. 499.

326. See the terms of the schedule 55 Geo. 3. c. 184. (8) *Fisher v. Leslie*, 1 Esp.

(3) *Ramsbottom v. Turnbridge*, 2 Maule & S. 434. *Ingram v. Lea*, 2 Campb. 521. *Adams v. Fair-*

Rep. 426. *Israel v. Israel*, 1 Campb. 499.; but see *Guy v. Harris*, Chitty on Bills, 335. 6 ed. n. C.

in payment of the sum of £5 by instalments, together with costs to be taxed, the court held, that in consequence of the terms which had been added, the paper in question amounted to an agreement, but that it was an agreement for less than £20, and therefore not liable to a stamp (1). A bill of parcels subscribed, "settled by two bills, one at nine and the other at twelve months," requires either a receipt or an agreement stamp (2). A receipt for the price of a horse, "warranted sound," is evidence of the warranty without an agreement stamp, because no stamp is necessary upon an agreement respecting the sale of personal property (3). Where C. was directed by a letter from B. to pay, out of the proceeds of his goods then unsold in his C.'s hands, a certain sum of money to D., which C. consented to do by letter to D., (which letter was stamped with an agreement stamp), and these letters being given in evidence to prove that the money was paid by order of B., it was holden that they did not amount to an agreement between B. and C.; and consequently, that the stamp was improper, and that the order itself for payment should have been stamped, as being an order for the payment of money out of a fund, which might or might not be available within the meaning of the schedule of the statute. With reference to agreements or minutes thereof, where the subject matter is under the value of £20 (4), it appears by the before mentioned case, that an agreement to confess a judgment for a sum exceeding £20, to secure a sum under that amount, with costs, is such (5); and that where an article is sold by auction in separate lots to the same purchaser, if each lot separately is under £20 value, no stamp is requisite. (6)

Denomination.

The rules by which the *denomination* of the stamp is governed must always have reference to the subject matter of the agreement, and the situation of the circumstances under which it is made. And where it was agreed on the back of a promissory note by which the plaintiff, the payee, undertook to enlarge the time for payment specified in the body of the note, it was held, that

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| (1) Ames v. Hill, 2 Bos. & Pul. | (4) Firbank v. Bell, 1 Barn. & Ald. 36. |
| 150. Reardon v. Swaby, 4 East, | (5) Ames v. Hill, 2 Bos. & Pul. |
| 188. S. P. Phillips on Ev. 531. | 150. |
| (2) Smith v. Kelly, Peake, 25. n. | (6) Emerson v. Heelis, 2 Taunt. |
| 4 Esp. 249. | 38. |
| (3) Skrine v. Elmore, 2 Campb. | |
| 407. Browne v. Frye, id. | |

such agreement could not be considered as incorporated with the note, so as to render an agreement stamp necessary (1); and a written acknowledgment of the payment of money, stamped as a receipt, is evidence of the fact of payment, although there may be other writing on the same paper amounting to an agreement, provided this does not in any manner controul or qualify the former part (2); it is evidence also of the consideration on which the money was paid, if the consideration is stated in the receipt (3): "I promise to pay A. B. £65, and also all other sums which may be due to him," requires an agreement stamp. (4)

Upon the exemption clause in the above act in favour of any memorandum, agreement for granting a lease or tack at rack rent of any land or tenement under the yearly value of £5, there appears to be some nice distinctions as to what shall amount to a present and absolute lease, or an agreement for a future one, and this must be always governed by the real intention of the parties with the wording of the agreement. Thus if the words in an agreement are, that "A. *shall hold* and enjoy, &c." they operate as words of present demise, but if accompanied by restraining words, or they be followed by others which shew that the parties intended that there should be a lease in future, they constitute merely an agreement for a lease, for the whole must depend in this and similar instances on the intention of the parties (5). A paper containing words of present contract, with an agreement, that "the lessee shall take possession immediately," and that "a lease shall be executed *in future*," operates only as an agreement for a lease (6). So in respect to copyhold premises, an instrument on an agreement stamp, reciting that A. in case he should be entitled to certain copyhold premises on

EXEMPTIONS.
1st, Agreement
for lease under
£5 per annum

(1) Stone v. Metcalfe, 1 Stark. 53. 4 Campb. 217. S. C.; and see id. 127. 4 Taunt. 844.

(2) Grey v. Smith, 1 Campb. 387.; and see Peake's Rep. 128. 3 Taunt. 382. 1 Campb. 501.

(3) Watkins v. Hewlett, 1 Brod. & B. 1.

(4) Smith v. Nightingale, 2 Stark. 375.

(5) Jackson v. Ashburner, 5 T. R. 163. Morgan v. Bissell, 3 Taunt. 65. Drake v. Munday, Cro. Car. 207. Maldon's case,

Cro. Eliz. 33. Harrington v. Wise, Cro. Eliz. 486. Tisdale v. Sir W. Essex, Hob. 34. Baxter v. Brown, 2 Black. 973. Barry v. Nugent, cited in 5 T. R. 165, 7. Pool v. Bentley, 2 Campb. 286. 12 East, 168. S. C. Tempest v. Rawling, 13 East, 18. Doe Walker v. Groves, 15 East, 244. Doe Bromfield v. Smith, 6 East, 530.; and see Woodfall's Law of Landlord and T. 22 b.

(6) 1 T. R. 735.

the death of B., would immediately demise the same to C., declaring that "he did agree to demise and let the same," with a subsequent covenant to procure a licence to let from the lord, operates only as an agreement for a lease, and not as an absolute demise. (1)

ad, Agreement
for hire of a
servant, &c.

An agreement for the assignment of an apprentice from one master to another is not within the exemption relating to the hire of any labourer, servant, &c.; the term "hiring" not being applicable to an apprentice (2); and if such written agreement is unstamped, it cannot be admitted in evidence, nor can parol evidence of the terms be received.

3d, Agreement
for sale of goods.

With respect to what amounts to a memorandum letter, or agreement made for or relating to the sale of any goods, wares, and merchandize, it has been determined, that an agreement by the defendant to take a share of some goods which has been bought by the plaintiff on their joint account, and to pay for them at a certain time, is an agreement relating to the sale of goods; and therefore exempted from a stamp duty (3). So also is an agreement by a broker to indemnify his principal from any loss, by a resale of goods bought by broker for him (4); or a guarantee for the payment of goods, which a third person was about to purchase, to a certain amount (5); or a receipt for the price of a horse containing a warranty of soundness (6); or an agreement to cancel a former agreement respecting a sale of goods, and for the future sale of goods upon different terms (7). But a letter from a principal to his factor, containing bills of exchange drawn upon the factor, and engaging to provide for the bills of certain goods in the factor's hands, or about to be placed there, remained unsold when the bills should become due, is not within the exemption of the act, and requires an agreement stamp (8); and the court there held, that the description in the act was confined to instruments which have the sale of

(1) Coore v. Clare, 2 T. R. 739.

East, 242. Watkins v. Vince,

(2) Rex v. St. Paul's, Bedford,

2 Stark. N. P. C. 369.

6 T. R. 453. Rex v. Ditchingham,

(6) Skrine v. Elmore, 2 Campb.

4 T. R. 769.

407.

(3) Venning v. Leckie, 13 East, 7.

(7) Whitworth v. Crockett,

(4) Curry v. Edenson, 3 T. R.

2 Stark. 431.

524.

(8) Smith v. Cater, 2 Barn. &

(5) Warrington v. Furber, 8

Ald. 778.

goods for their *primary* object, and that the *primary* object of the letter in question was the obtaining money upon a pledge of goods intended to be placed in the factor's hands, and an agreement between merchants, that one shall take a share in the outfit of a ship, and the adventure is not an agreement for or relating to the sale of goods within the proviso (1). It has been decided, that where the subject matter of the agreement does not relate to the sale of goods in existence, but for the future making of them, a stamp is necessary on the ground that it is not a contract for or relating to the *sale* of goods, but relating to the *making* of goods, and for work and labour to be done (2); but this case appears to have been decided on the principle of the clause in the statute of frauds which relates to the sale of goods, and it is to be observed that the clause of the latter statute imposes an immediate delivery or part acceptance of the goods bought, and with reference to this it has been decided (3) that a contract for goods not in existence was not within the meaning of that statute. In the stamp act, however, nothing is said about the delivery, nor is there any reason for supposing that the legislature intended to make a distinction with respect to stamping, between contracts for the sale of goods ordered to be made, and contracts for such as are already made, and a late decision seems to have adopted this doctrine, where it was held that a contract for the purchase of a quantity of linseed oil was not liable to a stamp, although the oil had not been made, but was to be prepared out of raw materials in the seller's possession (4). An agreement for the sale of crops growing on certain lands, to be delivered afterwards, has been determined to be an agreement for an interest in land, and is therefore not exempted as a sale for goods (5). But this decision is only on the ground of the relation to an interest in the land, on account of the crops not being deliverable till a future period, and thereby deriving a benefit from

Sale of growing crops.

(1) Leigh v. Banner, 1 Esp. 403.

(2) Buxton v. Bedall, 3 East, 503.

(3) Groves v. Buck, 3 Maule & S. 179.

(4) Wilks v. Atkinson, 6 Taunt. 11. 1 Marsh, 412.; and see the opinions of Lord Alvanley, C. J. and Chambre, J. in Waddington v. Bristow, 2 Bos. & Pul. 454.;

and see Phillips on Evid. 5 ed. 534.; and see Warrington v. Furber, 6 Esp. 89. 8 East. Curry v. Edenser, 3 T. R. 524. Long on Personal Property, 58.

(5) Waddington v. Bristow, 2 Bos. & Pul. 453. Emmerson v. Heelis, 2 Taunt. 38. Crosby v. Wadsworth, 6 East, 602. Teal v. Auty, 2 Taunt. & B. 99.

4th, Letters
between mer-
chants.

remaining on the land, for where on a like agreement, the purchaser was to take up the crops immediately, the land was only considered as a mere warehouse for the goods, and the agreement was held to be within the exception (1); the distinction however appears to be very nice. Where a person carrying on or managing the business of another, writes a letter containing a promise to pay such three persons debt contracted in the course of such business, such a letter may be considered as falling within the exemption of the stamp act, which meant that the correspondents of merchants and tradesmen at the distance of fifty miles from each other, on the faith of which they had considerable dealings, should not be fettered with stamps. (2)

Bills of ex-
change, pro-
missory notes,
and orders for
payment of
money.

With respect to *foreign bills*, it is clear that the legislature did not mean to extend the stamp duties imposed by these acts to such foreign bills as are made abroad, where the use of them could not be enforced; and it may be collected from the language of the acts, that the duty is only imposed on bills drawn in Great Britain (3). And as we have before seen, where a bill was drawn in Ireland, and blanks left for the date, sum, time when payable, and the name of the drawee, and transmitted to England, where it was completed and negotiated, it was held that this was to be considered as a bill of exchange, from the time of signing and indorsing it in Ireland, and that an English stamp was not necessary (4). So where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bonâ fide* holder filled in his own name as payee, it was considered that no English stamp was necessary (5); but if a bill be drawn in England, though dated at some foreign place, such bill cannot be enforced here without an English stamp. (6)

It would be impracticable to lay down any general rule which might govern a party in deciding what amounts to a bill of exchange, or in order for him to obtain a stamp of a proper *denomination*; and he can only be referred to treatises on that sub-

(1) Parker v. Staniland, 11 East, 362.; and see Warwick v. Bruce, 2 Maule & S. 205.

(2) Mackenzie v. Banks, 5 T.R. 176.

(3) 55 Geo. 3. c. 184. Crutchley v. Mann, 1 Marsh, 29.

(4) Snaith v. Mingay, 1 Maule & S. 87.

(5) Crutchley v. Mann, 5 Taunt. 529. 1 Marsh, 29 S. C.

(6) Jordaine v. Lashbrooke, 7 T.R. 601. Abraham v. Dubois, 4 Campb. 269.

ject. The legislature is strict in requiring these instruments to have a stamp of a proper denomination affixed to them, and even this though it may be of greater value than the one required. (1) It has been decided, that where C. was directed by letter from B. to pay, out of the proceeds of his goods then unsold in his C.'s hands, a certain sum of money to D., which C. consented to do by letter to D., which letter was stamped with an agreement stamp, and these letters being given in evidence to prove that the money was paid by order of B., that they did not amount to an agreement between B. and C., and consequently, that the stamp was improper, and that the order itself for payment should have been stamped, as being an order for the payment of money out of a fund which might or might not be available within the meaning of the statute. (2)

With respect to the *amount of the sum payable*, it was recently made a question, whether a stamp for the exact amount of £50 was sufficient for a bill for that sum, with all legal interest; it was contended that the stamp was insufficient, because the bill was to carry interest from the date, and therefore a larger sum was payable upon it than £50; but it is reported, that Lord Ellenborough inclined to think the stamp sufficient, as there was no interest due when the bill was drawn, and it was then a security for the sum of £50, and no more, and as there is always interest to be recovered, if the bill be not paid the day it becomes due. The case afterwards came before the court, when it was decided upon another point, and no opinion was given as to the sufficiency of the stamp (3). In a subsequent case, where a promissory note for £30, and interest from the date, was payable three months after date, and was impressed only with a 2s. 6d. stamp: on the trial, before Holroyd J. at the sittings at Westminster after Michaelmas term 1820, it was objected, that as the £30, with the interest for three months, secured by the note, exceeded £30, and the note was payable at a time exceeding two months, or sixty days, a 3s. 6d. stamp was necessary; but the learned judge overruled the objection, and afterwards, on motion for a new trial, the whole court discharged the rule,

(1) *Firbank v. Bell*, 1 Barn. & Ald. 36.; see this case, ante 168. (3) *Israel v. Benjamin*, 3 Campb. 40.

(2) Ante 168.

EXEMPTIONS.

saying, that the addition of interest ought not to be taken into calculation, for otherwise, a bond for £1000, and interest, would require a stamp for a larger sum than £1000, which would be contrary to practice and principle (1). Where a promissory note for £400 was drawn on 7th July 1818, payable two months after sight, it was held, that as such two months exceeded sixty days' sight, it required a stamp of 8s. 6d., though a 6s. stamp would have sufficed, if it had been payable at two months after date, or sixty days after sight (2). Upon the exempting clause in the former acts in favour of checks on bankers, it has been holden, that the person on whom the check is drawn, must be, *bona fide*, a banker (3); and that a draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, must be stamped, or will be void (4). It has been holden, that a bill, payable at sight, is not to be considered as a bill payable on demand, so as to be exempt from duty under the stamp act 23 Geo. 3. c. 49. s. 4. in favour of bills payable on demand (5).

BONDS.

An acknowledgment, whereby the obligor admits that he has broken the condition, and promises to pay a certain sum in satisfaction, is evidence of the breach without a stamp (6). A bond conditioned for the payment by quarterly payments of an annual rent, is within the 48 Geo. 3. c. 149. schedule part 1. which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly (7). A bond conditioned for not converting a house to a particular purpose, does not require an *ad valorem* stamp (8); nor does a covenant to pay an annuity as a consideration for relinquishing a business and the use of premises (9). A bond

(1) *Pruessing v. Ing*, Hil. T. 1821. K. B. and 4 Barn. & Ald. 204.

(2) *Sturdy v. Henderson*, coram Abbott, C. J. Sittings at Guildhall after Easter Term 1821, and on motion for new trial. 4 Barn. & Ald. 592.

(3) *Castleman v. Ray*, 2 Bos. & Pul. 383.

(4) *Allen v. Keeves*, 1 East, 435. *Whitewell v. Bennett*, 3 Bos.

& Pul. 559.

(5) *Janson v. Thomas*, B. R. Trin. 24 Geo. 3. Bayley, 42.

(6) *Lyburn v. Warrington*, 1 Stark. 162.

(7) *Attree v. Anscomb*, 2 Maule & S. 88.

(8) *Hughes v. King*, 1 Stark. 119.

(9) *Lyburn v. Warrington*, 1 Stark. 162.

conditioned for the safe custody and production of a box containing the subscription of a benefit club, is within the exemption. (1)

The act of the 55 Geo. 3. c. 184. sufficiently explains the amount and value of the stamp to be imposed on *life* insurances. Insurance,
Policies of. With respect to insurances against *fire* there are a few provisions, which were made previously to the passing of the last act on stamps, which are as follow:—In case of an insurance for less than a year, the insured shall pay only so much of the yearly duty as shall bear a proportion to the part of the year for which such policy is given (2). In case of any policy for one or more years, and a part of a year, the insured shall, as to such part of a year only, be liable to so much of the duty as shall bear a proportion to such part of a year if the insured shall, on the first payment of the duty, pay as well the proportion of the duty for such part of a year as the whole of the first year's duty, except a fraction less than a penny, which shall not be accounted for (3). Where a new policy is taken out, before the expiration of an old one, for insuring a greater or different sum, the same proportionable abatement, which shall accrue on the new policy, shall be made as the insurer shall make in respect of the premium (4). All insurers against fire may take, by one payment, the duty hereby imposed for the whole of the term for which the policy is granted, if the person insured shall so desire, and in consideration of such prompt payment of the duty as by the act would not be payable till a future time, and in such case, such insurer may make the same abatement of the duty as the insurer shall make, in consideration of receiving the premium for the whole term of insurance by one payment (5); the percentage duties must be paid at once (6). Every policy made for insuring houses, furniture, goods, &c. or other property, from loss by fire, shall be exempt from the duties granted by 37 Geo. 3. c. 111. (7) The schedule of 55 Geo. 3. c. 184. part 1. is very clear and explanatory with regard to the value of stamps on sea insurances. It has been decided, that where the distinct interests of several are insured under one entire sum, "to be

(1) Carter v. Bond, 4 Esp. 253.

(2) 22 Geo. 3. c. 48. s. 14.

(3) Id. sec. 15.

(4) Id. sec. 16.

(5) Id. sec. 18.

(6) 55 Geo. 3. c. 184. s. 32.

(7) 38 Geo. 3. c. 85. s. 3.

thereafter declared and valued," the stamp must cover the fractional parts of £100 in each interest. (1).

Receipts.

An I. O. U. is evidence of the acknowledgment of a debt without being stamped (2). So where a promissory note is given without a stamp, and the maker writes upon it a memorandum of his having paid a certain sum for interest, such memorandum may be read as an admission that there was due a principal sum which would yield so much interest (3). Where the indorsements on a bond have left no place for receipts upon subsequent payments, such receipts, written on plain paper annexed to the bond, may be read in evidence (4). If a tradesman write "settled" under his bill, and put his initials, he incurs the penalty for giving a receipt without a stamp (5). A receipt for money paid to deputy receivers general requires no stamp, though it be signed by their clerk (6). A receipt given on a receipt stamp is not invalidated by the addition of matter which requires an agreement stamp, where the words added do not controul or qualify the terms of the receipt (7). And a receipt, noticing the terms or considerations of a payment, does not require an agreement stamp (8). So a receipt for the price of a horse, "warranted sound," is evidence of the warranty without an agreement stamp (9). An instrument containing an acknowledgment of having received an acceptance, and an undertaking to provide for it, was held to require a receipt stamp (10). A bill of parcels subscribed, "settled by two bills, one at nine and the other, at twelve months," requires a receipt stamp. (11)

2d, Where several stamps are necessary or not.

A question has often arisen, whether an instrument, to which several persons are parties, require several stamps, or whether a

(1) *Rapp v. Alluutt*, 15 East, 606.

(2) *Fisher v. Leslie*, 1 Esp. 426. *Israel v. Israel*, 1 Campb. 499.; sed vide *Guy v. Harris*, Chitty on Bills, 6 ed. 335. n. c.

(3) *Manby v. Peel*, 5 Esp. 121.

(4) *Orme v. Bond*, 4 Campb. 336.

(5) *Spawforth v. Alexander*, 2 Esp. 621.

(6) *Edden v. Read*, 3 Campb. 338.

(7) *Grey v. Smith*, 1 Campb. 388.

(8) *Watkins v. Hewett*, 3 Moore, 211. 1 Taunt. & B. 1.

(9) *Skrine v. Elmore*, 2 Campb. 407. *Browne v. Frye*, *ibid*.

(10) *Scholey v. Walsby, Peake*, 24. qu. or a note or agreement stamp.

(11) *Smith v. Kelly, Peake*, 25. n. or an agreement stamp, S. C. as reported 4 Esp. 249.

single stamp is sufficient; and the distinction established is, that if the interest of the parties relates to one thing which is the subject matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject matter as to all the parties, there a single stamp will be sufficient, but where the parties have separate interests in several subject matters, there ought to be a separate stamp for each party against whom or in whose favour the instrument is offered in evidence (1). Therefore, if a debtor compounds with his creditors, and each creditor signs the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition, there every covenant is in fact a separate covenant, and the several deed of each creditor who signs the deed, but the whole being only one transaction, a separate stamp for each person is not required (2). So if several persons bind themselves severally in a penalty by one bond conditioned for the performance of certain acts by each and every of them, all conducive to the same object, such a bond requires only one stamp (3). Upon the same principle it has been held, that an agreement relating to the prize shares of different persons, though several as to the share of each, yet being payable in respect only of one entire fund, is only chargeable with one stamp (4); and on the authority of this case the court of king's bench determined, in a late case, that a single stamp was sufficient for an agreement which several persons had entered into for a subscription to one common fund, for the purpose of constructing a dock (5). In the case of *Jones v. Sandys* (6) the question was, whether a bond, in the condition of which a mortgage deed was mentioned, ought to have had two stamps, and the court held that it was not necessary; and in delivering their opinion they mentioned the cases of bargain and sale, lease and release, mortgage with covenant to pay the money, as constantly charged with only the single duty.

But the rule is different where the instrument includes in effect several transactions, and the subject matter is distinct as

(1) 13 East, 246.

(4) *Baker v. Jardine*, 12 East,

(2) *Bowen v. Ashley*, 1 New
Rep. 278. *Goodsen v. Forbes*,
6 Taunt. 171. 1 Marsh, 525. S.C.

235. n. b.

(5) *Davis v. Williams*, 13 East,
232.

(3) *Bowen v. Ashley*, 1 New
Rep. 274.

(6) *Barnes*, 463.

to the several parties. Thus, an instrument containing the admissions of several persons to a corporation requires as many stamps as there are admissions (1). But a paper containing contracts by several persons relative to different things, though stamped with a single stamp, provided the stamp is affixed to the name of one party in particular, and not generally, is good evidence as to that particular party. (2)

With respect to insurances, the legislature has regulated the number of stamps in the schedule of 55 Geo. 3. c. 184, part 1.; and other enactments declare the properties of any number of persons in any ship or cargo, or both, to the amount of £1,000 in the whole, may be insured in any one policy duly stamped, and to any amount by one policy stamped with two stamps, and such policy shall be valid (3). The properties of any number of persons in any ship or cargo, or both, may be assured in one policy, if stamped for each person (4). All policies of assurance by which the property of one person, or of any particular number of persons in partnership, or of one body politic or corporate, in any ship or cargo, or both, is assured to the amount of more than £1,000, shall be stamped with two stamps; and such policies not so stamped shall be void, and the premium remain the property of the assurer. (5)

ad, Effect an alteration of instrument after it has been stamped has under the stamp laws.

When a stamped instrument has been once used for one purpose it cannot be altered without a new stamp. If the parties have altered their original intention, and make a new instrument different from that which they originally contemplated, a new stamp will be necessary (6); for where a stamp has been used for an effectual purpose it cannot be afterwards used for another, though of a precisely similar nature to the first (7). Thus, if a bill of exchange, or promissory note, after it is once perfected, be altered in any material part, as in the date, sum, or time

(1) *Rex v. Reeks*, 2 Ld. Raym. 1445. 2 Stra. 716. S. C.

(2) *Powell v. Edmunds*, 12 East, 6. *Doe Copley v. Day*, 13 East, 241.; see also *Waddington v. Francis*, 5 Esp. Rep. 182. *Perry v. Bouchier*, 4 Campb. 80.

(3) 7 Geo. 3. c. 44. s. 1. notwithstanding 5 Geo. 3. c. 46. s. 3.

(4) 5 Geo. 3. c. 46. s. 4.

(5) 8 Geo. 3. c. 25. ss. 2. 4.

(6) *Per Le Blanc in Bathe v. Taylor*, 15 East, 418.; and see 1 Ann. st. 2. c. 22. s. 2 & 3, to which the subsequent acts refer.

(7) *Hammond v. Foster*, 5 T. R. 635.

when payable, such alteration will render the bill wholly invalid (1); and every material alteration of a bill or note, after it is once complete, is considered as a fresh drawing or making, and the circumstance of the bill or note not having been negotiated will not afford any exception (2), and this rule is equally applicable in the case of an accommodation bill (3). And the above rules are applicable to fire and life insurances; but there is an express legislative provision (4) relating to the alteration of sea insurances, which allows an alteration to be made in the terms or conditions of such policy, duly stamped, after it has been underwritten, without requiring any additional stamp duty, provided the alteration be made before notice of the determination of the risk originally insured (5), and the premium originally paid shall exceed the rate of 10s. *per cent.* on the sum insured, and so that the thing insured shall remain the property of the same persons, and so that such alteration shall not prolong the term insured beyond twelve calendar months, and so that no additional sum be insured by such alteration.

If an alteration be made in any part of any mercantile instrument which is not material, or it be made merely for the purpose of correcting a mistake, and in furtherance of the *original* intention of the parties, such alteration, though made after the instrument is complete, will not invalidate it, with regard to the stamp laws, or otherwise (6). As to what will amount to a material alteration, or correcting a mistake in furtherance of such intention of the parties, must of course entirely depend upon the nature and wording of, together with the circumstances under which the parties executed the instrument; and it would be impracticable here to state any rule by which such alterations might be governed. (7)

Alteration to
correct mistakes,

(1) See Chitty on Bills, 6th ed. 103.

(2) *Bowman v. Nicholl*, 5 T. R. 537.; and see cases and decisions as to what are material alterations, Chitty on Bills, 103.

(3) *Calvert v. Roberts*, 3 Campb. 343. *Bathe v. Taylor*, 15 East, 412. *Prince v. Nicholson*, 1 Marsh, 72. n. c.

(4) 35 Geo. 3. c. 63. s. 13.

(5) *Ramstrone v. Bell*, 5 Maule & S. 270.

(6) *Sanderson v. Symmonds*, 1 Brod. & B. 426.

(7) As to alterations of bills of exchange after complete, see Chitty on Bills, 6 ed. 101. *Trapp v. Spearman*, 3 Esp. Rep. 57. *Marrison v. Petit*, 1 Campb. 82. *Tidmarsh v. Glover*, 1 Maule & S. 735. *Trench v. Nicholson*, 1

1. Alteration
as to time of
sailing.

In the case of *Kensingtone, Inglis* (1), where the policy was on goods and specie on board of ship or ships sailing between the 1st of October 1799, and the 1st of June 1800, being the property which should first sail to a certain amount, and upon the vessels carrying the goods, and a memorandum was written on the policy, and subscribed by the defendant on the 11th of June 1800, before any notice of the determination of the risk had been received, by which memorandum it was agreed to extend the time of sailing to the 1st of August following; the court of king's bench in this case held that the memorandum did not require a stamp, for although the time of sailing was extended, yet no new subject of insurance was introduced by the memorandum, but the object insured continued the same. In another case (2) which occurred upon the same clause, where the policy was originally on ship and outfit from London to the South Seas, but after the sailing of the ship was altered by consent of the underwriters, and declared to be "on the ship and goods," instead of ship and outfit, the court determined that as the outfit originally insured was essentially different from goods which were afterwards made the subject of insurance, the policy in its altered state required an additional stamp. "The question is," said Lord Ellenborough, C. J., in delivering the judgment of the court, "whether that part of the provision which requires that 'the thing insured shall remain the property of the same person,' has been in this case complied with. The words 'the thing insured shall remain the property,' appear properly to require and apply to *one* identical and continued subject matter of insurance; such subject matter *all along remaining* the property of the same proprietor, and to be illsuited to a case like the present, where the thing last insured is not only in fact, but in

2. Alteration as
to property in-
sured.

Marsh. 72. *Jacobs v. Hart*, 2 Stark. 45. *Kershaw v. Cox*, 3 Esp. 246. *Knill v. Williams*, 10 East, 435, 7. 12 East, 475. *Bathe v. Taylor*, 15 East, 517.; and see *Robinson v. Touray*, 1 Maule & S. 217. *Coles v. Parkin*, 12 East, 471. *Webber v. Maddocks*, 3 Campb. 1. *Peacock v. Murrell*, 2 Stark. 558.; as to immaterial alterations of policies, *Sanderson v. Symmonds*, 1 Brod. & B. 426. *Robinson v. Touray*, 1 Maule & S.

217. *Sawlett v. London*, 5 Taunt. 359.; and other instruments, *Cole v. Parkin*, 12 East, 471.

(1) 8 East, 273. *Hubbard v. Jackson*, 4 Taunt. 169. *Ridsdale v. Shedden*, 1 Campb. 107.

(2) *Hill v. Patten*, 8 East, 373. 1 Campb. 72. *S. C. French v. Patten*, 9 East, 351. *Hubbard v. Jackson*, 4 Taunt. 169.; the cases on this subject are collected in *Parke's Treatise on Insurances*, p. 46. last edit.

name and kind, as a specific subject of insurance essentially different from the thing first insured, and which begins also to have an existence at a different and much later period than the other, and when the thing first insured scarcely, or in a small degree only, *remains* or continues to exist at all." A memorandum indorsed upon a policy, waiving the warranty of sea worthiness, does not require a new stamp (1); and Mr. Justice Bayley compared the case to that of a warranty to sail within a certain time, which may be altered by an unstamped memorandum, even after the period when the condition has terminated, without affecting the continuance of the policy.

We have seen that the stamp acts prohibit the production of an instrument not duly stamped in evidence, and therefore in these cases the transaction cannot be proved at all until a proper stamp has been obtained (2); as in an action for use and occupation, if it appear that the defendant held under a written agreement, which, for want of a stamp, cannot be received in evidence, the plaintiff will not be allowed to go into general evidence, for the agreement is the best evidence of the nature of the occupation (3). Parol evidence of a lost or destroyed agreement cannot be received, if the agreement was on unstamped paper, though it has been wrongfully destroyed by one of the parties, yet the other party will not be permitted to prove its contents by parol evidence; and this is one of the risks which attends the omission to have the agreement properly stamped in the first instance, for if any accident happen to it before the stamp is affixed, all remedy by action is entirely gone. (4)

2. Of the consequences of no stamp, or an improper stamp being imposed.

It may frequently happen that the transaction is capable of being proved by other evidence besides a written instrument, and the objection arising from the stamp acts may be avoided by resorting to that other species of proof. Thus, although an unstamped receipt for the payment of a bill is not admissible in

1. In what cases parol testimony, or an unstamped instrument, may be admitted in evidence.

(1) *Weir v. Aberdeen*, 2 Barn. Rep. 213. *Doe St. John v. Hore*, 2 Esp. Rep. 724. *Ramsbottom v. Mortley*, 2 Maule & S. 445.

(2) *Rex v. St. Paul's, Bedford*, 6 T. R. 452. *Hodges v. Drakeford*, 1 New Rep. 271. *Rex v. Castlemorton*, 3 Barn. & Ald. 588. Ante.

(3) *Brewer v. Palmer*, 3 Esp. 478. 2 Barn. & Ald. 478.; but see post as to the cases where the due stamping will be resumed.

evidence, yet the fact of payment may be proved by a witness who saw the money paid, and even such an unstamped receipt may be shewn to the witness as a memorandum to refresh his memory (1). So in an action on a promissory note, though the plaintiff cannot give the note in evidence, unless it is duly stamped, yet he will not be precluded from recovering on one of the general counts of the declaration, if he can prove an admission of the original debt, or give other evidence of a consideration received by the defendant (2). And so, where a party to a suit admits on the record, that which if not admitted the other party must regularly prove, it cannot be necessary to produce that evidence which would otherwise be required (3). And on payment of money into court upon the whole declaration, a party is precluded from disputing the insufficiency of the instrument on which the action is brought, on account of the stamp. (4)

Of the admissibility in evidence of unstamped instruments.

Written instruments have been admitted in evidence without a stamp, in cases where they have been produced merely to prove something collateral, and where, by admitting them, effect is not given to an unstamped instrument, and when it was not material to consider whether the instruments were good or available in law (5). In the case of *Holland q. t. v. Duffin* (6), which was an action to recover several sums of money forfeited by insuring tickets in the lottery, contrary to the statute 22 G. 3. c. 47. s. 13, Lord Kenyon held, that an instrument, purporting to be a policy of insurance, might be given in evidence, though not stamped as a policy, for such a contract is declared by the act to be illegal and void, and could not have been intended by the legislature as an object of taxation. And in an action of debt for bribery at an election under statute 2 G. 2. c. 24. s. 7. (7), Lord Ellenborough C. J. held, that an unstamped promissory note, payable to the defendant, which a

(1) *Rambert v. Cohen*, 4 Esp. & S. 553. *Huddleston v. Briscoe*, N. P. C. 213. *Jacob v. Lindsay*, 11 Ves. 583.

(2) *Farr v. Brice*, 1 East, 57. 40. (4) *Israel v. Benjamin*, 3 Campb.

Alves v. Hodgson, 7 T. R. 243. (5) *Castleman v. Ray*, 2 Bos. & Tyte v. Jones, 1 East, 58. n. a. Pul. 383.

Brown v. Watts, 1 Taunt. 353. (6) *Peake*, N. P. C. 57. 5 Esp. *Wade v. Beasley*, 4 Esp. N. P. C. 7. Rep. 92. 2 East, P. C. 955.

(3) By Lord Eldon, Ch., 11 Ves. (7) *Dover v. Maestaer*, 5 Esp. 596. *Thynne v. Protheroe*, 2 Maule N. P. C. 92.

witness said he had given for the repayment of money received by him as a voter from the defendant (one of the candidates), might be admitted as evidence of the transaction, to corroborate the testimony of the witness. A paper, purporting to be a bill of exchange or promissory note, may be given in evidence, though unstamped, to support an indictment for forgery, or for uttering with a knowledge of the forgery (1); for the stamp acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it. The stamp is not, properly speaking, any part of the instrument, but merely a mark impressed on the paper to denote the payment of a duty, and is collateral to the instrument itself (2). And if a person were to be sued for a penalty for having negotiated an instrument without a stamp, there is no doubt but that the unstamped instrument might be given in evidence, notwithstanding the general prohibitory words of the stamp acts (3). An unstamped receipt may be shewn to a witness as a memorandum, in order to refresh his recollection of a fact there stated (4). An unstamped contract made between commissioners of the navy and other persons, containing also a direction by the commissioners to their clerks, in consequence of the contract to issue certificates in a certain form, is evidence of such a direction having been given, though not evidence of the contract (5). A written agreement for which an action of trover is brought, and which is produced at the trial by the defendant, is not inadmissible in evidence on account of the want of a stamp (6). A lease adduced to prove that fixtures are to be paid for, must, in an action for their value, be stamped (7). The unstamped part of an agreement is admissible on the part of the plaintiff as secondary evidence of the agreement, after proof of notice to the defendant to produce the stamped part, which is in his posses-

(1) Hawkeswood's case, 1783, Judge Grose, who delivered the opinion of the Judges in Reculist's case, 2 Leach, Cr. C. 813.

1 Leach, Cr. C. 292. 2 East, P. C. 955. S. C. Lee's case, 1784, 1 Leach, Cr. C. 293. n. () Morton's case, 1795, 2 East, P. C. 955. Reculist's case, 1796, 2 Leach, Cr. C. 811. Davies's case, 1796, 2 East, P. C. 956. Rex v. Castle-morton, 3 Barn. & Ald. 589. ; see Whitwell v. Dimsdale, Peake, N. P. C. 168.

(3) Ibid.

(4) Rambert v. Cohen, 4 Esp. N. C. P. 213. Jacob v. Lindsay, 1 East, 460.

(5) Hedges's case, 28 Howell's St. T. 1344.

(6) Scott v. Jones, 4 Taunt. 356.

(7) Corder v. Drakeford, 3 Taunt.

(2) See the judgment of Mr. 382.

sion (1); and there can be no difference in this respect, whether the plaintiff has specially declared upon the agreement, or merely offers it as evidence in the course of the case. On a question of settlement by hiring and service, although a general hiring cannot be presumed from the mere fact of service, if the service has been performed under written articles of agreement, which are not admissible in evidence for the want of a proper stamp, yet where the question is, whether the service commenced after the expiration of the articles, it has been holden that they may be inspected for the purpose of ascertaining this collateral fact, whether they would apply to the subsequent service (2). In an action for the non-delivery of goods, if the contract is proved by parol evidence, and it should appear that the parties made a contract on unstamped paper, the court may inspect the instrument, to see whether it applies to the goods which are the subject of the action, and if they are not included in the contract, the parol evidence would be properly admitted (3). So in an action for money lent, where the plaintiff proved that he had advanced the money to the defendant, who gave him a note for the amount on unstamped paper, and the defence was that he had been induced to give the note in a state of intoxication, without having received any part of the money, Lord Ellenborough C.J. held, that the note might be inspected by the jury as a contemporary writing to prove or disprove the fraud imputed to the plaintiff (4). In the case of the *King v. Pooley* (5), the prisoner was indicted under the statute 7 G. 3. c. 50. s. 1. which makes it capital felony for any person employed in receiving letters to secrete any letter containing a bank note, or any warrant or draft, &c. for the payment of money. It appeared at the trial, that the draft, contained in the letter which the prisoner had secreted, was drawn above ten miles from the banking-house; the prisoner's counsel then objected, that as the draft was on unstamped paper, it was not a valid order for the payment of money, and therefore not within the statute on which

(1) *Garnons v. Smith*, 1 Taunt. 507. *Waller v. Horsfall*, 1 Campb. 501. provided the original was stamped, 2 Barn. & Ald. 478, ante; but this will be presumed till the contrary appear, 1 Stark. 35, and post, 186.

(2) *Rex v. Pendleton*, 15 East, 449. 455.

(3) 15 East, 455.

(4) *Gregory v. Fraser*, 3 Campb. 454.

(5) 3 Bos. & Pul. 311.

the prisoner was indicted; and they founded this objection on the statute 31 Geo. 3. c. 25., the fourth section of which exempts from stamps only such orders for the payment of money as are drawn on a banker residing within ten miles of the place where the order is made; and the 19th section provides, that no bill, note, draft, &c. shall be pleaded or given in evidence in any court, or admitted in any court, to be good, useful, or available in law or equity, unless they are written on paper duly stamped. This point was reserved at the trial; and the case was afterwards argued before the judges in the exchequer chamber, when the objection taken on the part of the prisoner was, first, that which has been stated, namely, that the draft in question was not a draft for the payment of money within the meaning of the stat. 7 Geo. 3. c. 50. s. 1.; and, secondly, that the indictment, which averred that the draft was in force at the time of the secreting, had not been proved, as, from the want of a stamp, the draft had never been available. The opinion of the judges was not publicly declared, but the prisoner received a pardon for the offence charged in the indictment, and he was afterwards tried on the second section of the same act, which makes it a capital offence for any person to rob any mail of a letter or packet, or to steal or take any letter from any mail, or from any place for the receipt of letters, &c. (1). It was objected, at the second trial, that the draft before mentioned, being on unstamped paper, could not be received in evidence as a medium to shew that the prisoner had stolen the letter, but the court overruled the objection, being of opinion, that the draft, though unstamped, might be admitted in evidence for collateral purposes, though not for the purpose of recovering the money mentioned in it; and the evidence was accordingly received. Here the paper was not offered in evidence, as it was on the former trial, as a draft for the payment of money, but merely as a paper contained in the letter; and the fact of the prisoner having this paper in his possession, was evidence against him of his having stolen the letter in which it was contained. An objection similar to that which was taken on the former trial in the last case, was again taken in the case of the *King v. Gillson* (2). The indictment was for feloniously setting fire to a certain house,

(1) 3 Bos. & Pul. 315.; and 1 East, pl. C. addenda, 17. Chitty's
this part of the case is reported in *Crim. Law*, 1 vol. tit. Evidence.

(2) 1 Taunt. 25.

with intent to defraud an insurance company; at the trial, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods in a house there described were insured against fire, and upon this policy a memorandum was indorsed, stating that the goods insured had been removed from the house described in the policy to another house mentioned in the memorandum, in which last-mentioned house the prisoner was charged with having committed the felony; the policy was properly stamped, but the memorandum had no stamp; and the objection taken for the prisoner was, that in support of the charge, it was essentially necessary to shew that there subsisted a legally effective contract, and that by the express provision of the stamp acts, the memorandum in question not being stamped could not be given in evidence, or be good or available in any manner whatever; and a distinction was drawn between this case and the above mentioned, where an unstamped forged instrument was admitted in evidence against the party charged with having forged it, or with uttering it, knowing it to be forged. The point was reserved for the opinion of the judges, and argued in the exchequer chamber, and judgment was afterwards given at the Old Bailey, that the prisoner should be discharged.

In what cases
stamp presumed
to be correct.

A regular stamp may *be presumed* in certain cases: If an agreement is in the possession of a party to the suit, who refuses to produce it after a notice, the other party may give in evidence of a copy of the agreement, without proving that the original was duly stamped, the party who has the original in his possession may prove the negative (1). If an instrument which ought to be stamped is proved to have been lost, parol evidence of its contents may be admitted without proof of the stamp being regular, where it can be presumed from the circumstances of the case that the instrument was duly stamped (2). In a late case upon this point, on a question of settlement between two parishes (3), it appeared that an indenture of apprenticeship, which had been regularly executed thirty years before, was delivered to the apprentice at the end of the term, and lost; that a

(1) *Crisp v. Anderson*, 1 Stark. N. P. C. 35. *Rex v. Badley*, 1 Bott, 549. S. P. ante.

(2) *Rex v. East Knoyle, Burr. Set. Cas.* 151, 1 Bott, 547. S. C. (3) *Rex v. Long Buckley*, 7 East, 45.

premium had been paid with the apprentice; and further, that the parish in which he had served under the indenture, had for many years treated him as one of their parishioners: on the other side, it was proved by the deputy register and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp, or enrolled from the time of the date to the time of the trial of the appeal; but the court of king's bench were of opinion, that the court below were right in presuming that the indenture had been properly stamped. "The question before the justices," said Lord Ellenborough, "was, whether the presumption that all was rightly done after the lapse of so many years, was sufficiently rebutted by the negative evidence of the officer; they thought not, and we cannot say that they have done wrong, for the presumption of law is to be favoured, and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office (1).

As we have before seen, a party before he enters into any mercantile contract or instrument in writing which is liable to a stamp duty, is required by the legislature to obtain a stamp of a proper denomination and value to be placed on the paper, &c. whereon he intends such contract or instrument to be set forth (2); and it cannot in general be stamped afterwards without incurring some penalty, and in some instances the stamp cannot be obtained at all, and the party is precluded from all remedy on the instrument; besides which the legislature has imposed many heavy penalties and punishments upon persons entering into agreements or other instruments liable to stamp duties before they are stamped. We shall not, however, inquire into the latter, but proceed merely to show in what cases, and within what time, instruments are allowed to be stamped after entered into; and with reference to agreements and instruments in general, if any matter is written on any vellum which is not duly stamped, it may be stamped afterwards upon payment of the

3. In what cases and how a defect in stamping or a defective stamp may be remedied.

(1) Ante. 2 Barn. & Ald. 478. c. 34. s. 10. 19 Geo. 3. c. 64. s. 5.

(2) 5 & 6 W. & M. c. 21. s. 9. 23 Geo. 3. c. 58. s. 8. 29 Geo. 3. c. 25. s. 58. 10 Ann. c. 50. s. 4. 29 Geo. 3. c. 56. s. 5. c. 19. s. 104. 10 Ann. c. 26. s. 71. 34 Geo. 3. c. 11. s. 10. 35 Geo. 3. 30 Geo. 2. c. 19. s. 19. 16 Geo. 3. c. 63. s. 14.

extra duty of £5 by way of a penalty, and the same shall then, and not otherwise, be admitted as evidence in any court so far as the same relates to the stamp (1). But this penalty may be avoided as far as respects agreements not under seal, if the instrument be properly stamped within twenty-one days from the time the same was entered into (2). The 37 Geo. 3. c. 19. s. 3. referring to s. 4. requires any indenture, lease, bond, or other deed, not duly stamped before execution, to be brought within one calendar month after the date thereof to the stamp office where it may be stamped, without payment of any penalty, but after that time it cannot be stamped without payment of a penalty of £10, and if not stamped within six months after, the penalty of £10 accrues upon every skin, &c. (3) In the case of an attested copy of any indenture, lease, or other deed, liable to the duties granted by 37 Geo. 3. c. 90. or 39 & 40 Geo. 3. c. 72. it may be stamped within sixty days after date of attestation, without payment of any penalty; but the penalty of £10 accrues if not stamped within that time (4). Where any accumulated penalties, exceeding £10, occurs on any skin or sheet or piece of vellum, &c. the same may be stamped upon payment of penalty of £10 only for any and every such skin, &c. (5). These enactments are again modified by the 44 Geo. 3. c. 98. s. 24. and 37 Geo. 3. c. 136. s. 3. which declare, that if it can be made appear to the commissioners of stamps that any instrument requiring a stamp duty has been engrossed, &c. without a stamp, either by accident or necessity, or without intention to defraud His Majesty, and such instrument is brought to the commissioners to be stamped within *twelve months* (6) after its execution, the commissioners will remit the penalty, or a part of it, and any person concerned in such engrossment, &c. shall be discharged from all further penalties other than such as shall not be so remitted. (7)

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| (1) 12 Ann. s. 2. c. 9. s. 25. | c. 136. s. 2. post. |
| 12 Geo. 1. c. 33. s. 8. | (4) 39 & 40 Geo. 3. c. 84. s. 2. |
| c. 35. s. 4. | (5) 37 Geo. 3. c. 136. s. 2. |
| 2 Geo. 3. c. 36. s. 4. | (6) 44 Geo. 3. c. 98. s. 24. which |
| 5 Geo. 3. c. 47. s. 4. | alters the 37 Geo. 3. c. 136. s. 3. |
| 5 & 6 W. & M. c. 21. s. 11. | which gave only 60 days. 55 Geo. 3. |
| 9 & 10 W. 3. c. 25. s. 60. | c. 184. 60 days. |
| (2) 23 Geo. 3. c. 58. s. 5. | (7) 37 Geo. 3. c. 136. s. 3. |
| (3) 37 Geo. 3. c. 19. s. 5.; but | 44 Geo. 3. c. 98. s. 24. |
| as to latter part, see 37 Geo. 3. | |

Bills of exchange, promissory notes, or other notes, drafts, or order, and all receipts, discharges, acquittances, notes, or memorandums for the payment of money, and requiring a stamp, are excepted from the foregoing enactments, and cannot be given in evidence, or admitted to be available in any court, unless duly stamped in the first instance, and they cannot properly be stamped after they are made (1); and though upon this statute it has been decided, that if the commissioners of stamps exceed their authority, and do stamp the bill or note after it has been made, no defence can be established to an action founded on the bill or note on that ground, because it would be injurious to paper credit if it were necessary for an indorsee to ascertain before he takes a bill whether or not it was stamped previously to its having been made (2); yet, according to more recent decisions, it should seem, that at least if the instrument be in the hands of the party in whose favour it was originally made, a subsequent stamping would not render it available against such positive enactment (3). The legislature indeed, perceiving the difficulty and hardship which the above statute created upon *bonâ fide* holders, passed a temporary act, 34 Geo. 3. c. 32. to enable the commissioners to stamp bills, &c. after drawn, where no fraud was intended originally upon the revenue; but this act has expired (4), and the holder of such bill has no remedy thereon (5), and indeed an unstamped bill or note is such a nullity as to impose no obligation to present it. (6)

It seems that policies of insurance cannot under any penalty be stamped after they are drawn, as by the 35 Geo. 3. c. 63. s. 14.

(1) 31 Geo. 3. c. 25. s. 19. which is still in force; and 55 Geo. 3. c. 184. s. 7. refers to it.

(2) *Wright v. Riley*, Peake's Rep. 173.

(3) *Roderick v. Hovill*, 3 Campb. 103. *Rapp v. Allnutt*, id. 106. in notes.

(4) Bayley, 26. in notes. Phillips on Ev. 3 ed. 459. n. *.

(5) And see 43 Geo. 3. c. 127. s. 5. and 44 Geo. 3. c. 98. s. 24.

In criminal prosecutions the want

of a proper stamp is not in general an available objection, see cases 1 Chitty, Cr. Law, 582 to 584. Phillips on Ev. 3 ed. 454 to 458.; and as to the instances in which an unstamped bill or note may be given in evidence, see 3 Bos. & Pul. 316. Peake's Rep. 75. 15 East, 449. 455. Phillips on Ev. 3 ed. 403. 454. 3 Campb. 454. and Chitty on Bills, 6 ed. 56. n. e. (6) *Wilson v. Vysar*, 2 Taunt. 288.

& 16. (1) it is provided that no insurance entered into in Great Britain, in respect whereof any duty is payable, nor any contract or agreement for such insurance, shall be pleaded or given in evidence unless duly stamped, and the commissioners are prohibited from stamping the same, if not stamped before engrossed. (2)

Where an agreement or any other instrument may be stamped after it is entered into or engrossed, whether upon payment of a penalty or otherwise (if within the time limited by act of parliament), it may be stamped at any time before the trial or hearing in equity of any action or motion in which it may be necessary to produce it in evidence (3); and where the defendant had applied to the court to set aside a judgment entered upon a warrant of attorney on an insufficient stamp, the court held the objection cured by procuring it to be stamped with a proper stamp. (4)

Of the denomination of the stamp as suitable to the instrument which requires it. (5)

Where an instrument or agreement requires a stamp, it must be stamped with one of a proper denomination, which the legislature has imposed to every particular species of instrument. Therefore a receipt stamp will not be available if used upon a promissory note, nor a note stamp if used upon a receipt. So articles of agreement under seal require a deed stamp, and an instrument containing a present demise of a house, containing also an agreement for goods and fixtures in the house, requires a lease stamp, the one contract being auxiliary to the other; and unless it is so stamped, it cannot be given in evidence as an agreement for the sale of the goods in an action to recover the amount (6). And although the stamp be an *ad valorem* one, or of higher value than what the instrument requires, but of an improper denomination, it is not

(1) And see *Roderick v. Hovil*, 3 Campb. 103.; and see ante. *Rogers v. M'Carthy*, Park. n. a. 45. *Marsden v. Reed*, 3 East, 572.

(2) This appears to repeal the 10 Ann. c. 26. s. 71. and 7 Geo. 3. c. 50. s. 24.; but qu. does not this only relate to sea insurances.

(3) *Rex v. Bishop of Chester*, 8 Mod. 365. 1 Stra. 624. S. C. 9 Ves. 252. 11 Ves. 595.

(4) *Burton v. Kirby*, 7 Taunt. 174. 2 Marsh, 480. S. C.

(5) 55 Geo. 3. c. 184. s. 10.

(6) *Corder v. Drakeford*, 3 Taunt. 382.

available in evidence, unless by statutory provisions to that effect. (1)

The mistake in the proper denomination of a stamp may, provided the stamp be of as equal or greater value than the one required, be cured without payment of any penalty, by obtaining one of a proper denomination at any time before the instrument is offered in evidence (2); and even this need only be done where the stamp shall have been specifically appropriated to another instrument, by having its name on the face of it (3). With respect, however, to bills of exchange, promissory notes, and other notes, drafts, and orders, if they bear a stamp of an improper denomination, though of equal or superior value to the stamp required, they must be stamped with one of a proper denomination before available in evidence, and this stamp may be procured on payment of the proper duty, and 40s. if the bill, &c. be not due or payable, or £10 if due. (4)

The regulations of the legislature in cases where an instrument has been stamped with a stamp of *less value* than the one imposed, are similar to those where the instrument has not been stamped before engrossed or written upon, except as to policies of insurance, in which case there appears some relaxation of the strictness in cases where the instrument has not been stamped in the first instance; for by the 50 G. 3. c. 35. s. 8., it is enacted, that where a policy is underwritten inadvertently for a greater sum than that for which it is stamped, if the insured shall procure another policy duly stamped, to be underwritten for the same risk and sum, and shall within one calendar month after last subscription on first policy, produce the same to commissioners, such commissioners upon proof of the mistake, may allow as spoiled, and cancel stamps on first policy, and give other stamps of the same description or value, or otherwise at their discretion, and where expedient, stamps of any other description,

Of the value of the stamp.

(1) Robinson v. Drybrough, 6 T. R. 317. Chamberlain v. Porter, 1 New Rep. 30. (2) 43 Geo. 3. c. 127. s. 5. which seems to repeal 37 Geo. 3. c. 136. s. 1. (3) 55 Geo. 3. c. 184. s. 10.; and see s. 4, 5. 50 Geo. 3. c. 35. (4) 37 Geo. 3. c. 136. s. 5, 6.; but this only relates to bills, &c. made after the passing of this statute, as they could not before in any case be stamped after they were issued or made. 31 Geo. 3. c. 25.

and of equal value in law. It was formerly considered, that an instrument bearing a stamp of *greater value* than the one required was insufficient, and could not be received in evidence (1); to remedy this, however, an act was passed, declaring that no instrument shall be ineffectual from being of a greater value than the stamp acts require. (2)

(1) *Farr v. Price*, 1 East, 55. c.184. s.10. and see s.7. 31 Geo. 3.

(2) 43 Geo. 3. c. 127. s. 6. c. 25. s. 19.; and see *Taylor v.*
50 Geo. 3. c. 37. s. 16. 55 Geo. 3. *Hague*, 2 East, 414.

CHAP. III.

Of Principal and Agent, Factors and Brokers.

IT is a general rule of law, that where a man has power, as owner or principal, to do a thing on his own account, he may transact and complete it by the intervention of an agent, *qui facit per alium facit per se* (1). In the present chapter it is proposed to consider the law respecting the relations of principal and agent, which will embrace the important points relating to factors and brokers; and in this investigation, after considering the different sorts and degrees of agencies, and who is competent to act for another, we shall examine the modes in which an agent may be appointed; then the distinction between general and special agencies; next, the nature and extent of an agent's authority; afterwards the right and liability of principal and agent with respect to third persons, and as between each other; and lastly, the modes in which the power of an agent may be determined.

An agent is one employed to act in the place of another, either for a general, or special, or limited purpose. The agents usually employed in mercantile transactions are factors or brokers. A *factor* is a party to whom goods are consigned for sale by a merchant, or other party, residing abroad, or at a distance from the place of sale, and he usually sells the goods in his own name. A *broker* is not intrusted with the possession of the goods, but is merely employed in making contracts relative either to the purchase or sale of the goods, and usually discloses the name of his principal (2). A *foreign factor* is a person who resides in one country, with an authority from a principal residing in another; a *home factor* is a person residing in the

Of the different
sorts of agencies.

(1) *Combe's Case*, 9 Co. 75 b. (2) See *Baring v. Corrie*, 2 Barn. Com. Dig. tit. *Attorney*, C. 1. & Ald. 137. and cases there cited Kyd. 32. on this distinction.

same country with the principal from whom he derives his authority. A factor is usually paid for his trouble by a commission of so much per cent. on the goods he sells or buys; but sometimes, in sales, he acts under what is called a *del credere* commission, in which case, for an additional premium beyond the usual commission, he undertakes and becomes answerable for the credit of the person to whom he sells the goods consigned to him by his principal (1). *Del credere* is an Italian mercantile phrase which has the same signification as the Scotch word *warrandice*, or the English word guarantee. As a *del credere* commission indemnifies the principal against the losses which may happen from the sales negotiated by his agent, so there is also a species of contract indemnifying the principal against any loss which may happen in consequence of his agent's purchases, through a failure on the resale. (2)

Who may be
an agent.

It does not appear that any person is by law precluded from acting as agent for another, and as this agency is a mere ministerial office, infants, femes covert, persons attainted, outlawed, excommunicated, aliens, and others may be agents (3); for the privileges and disabilities of those parties are merely personal, and the execution of a naked authority is not necessarily attended either with prejudice to those upon whom the former are conferred, or advantage to those upon whom the latter are imposed, or to any other person, who by law may claim any interest under them after their death.

How authorized.

Secondly, we will consider the modes in which an agent may be appointed; an agent may be appointed either by *parol* or by *deed*. The term *parol*, as we have seen, includes not only what is verbal, but also what is written, if it be not under seal. In general where a *parol* or simple authority is sufficient from the principal to the agent, such authority is not required by the common law to be in writing, although that form may in transacting matters of importance be preferable. Sir Ed-

(1) 1 T. R. 112. A *del credere* form of declaring upon it, see 3 vol. commission, without a written contract, subjects the party stipulating to receive it to an action for the debt of another, so that the statute against frauds does not apply. See Chitty on Pleading, 3 ed 179.

(2) See instance, 3 T. R. 524.

(3) Co. Lit. 52 a. Chitty on Bills, 6 ed. 23.

ward Coke says, in his Commentaries upon Littleton (1), that regularly the authority should be by letter of attorney or deed, and this doctrine is recognized in other works (2); but it is obviously rather matter of prudence than of necessity (3). And for the ordinary purposes of commerce, it would be very inconvenient, if a regular power of attorney were required in every transaction. The legislature have indeed required, by the statute against frauds, 29 Car. 2. chap. 3. that in some cases the authority delegated to an agent shall be in writing; but those provisions are principally directed to the transfer of an interest in *land*, or other real property, and do not affect the sale of goods or other mere mercantile transactions.

Where an agent is constituted to execute a deed, the authority is absolutely required to be under *seal*, for it would not be reasonable, that the power to effect so solemn an instrument should be transferred by any medium less solemn than an instrument equally deliberate. (4)

The agent of a corporation must always have been appointed by deed, where the agency concerned the interest or title of the corporation as to let lands, even from year to year (5); but for ordinary services, the agent need not be constituted by deed (6). And a notice to quit, given by an agent for a corporation, verbally authorized, is valid; and it has even been held, that the bank of England, or any similar corporation, may, without deed, empower its servants to make bills of exchange or promissory notes in its name, as is the usual practice; for this is not a

(1) Co. Lit. 52 b. cites Co. Lit. 48 b. 2 Rol. Abr. 8. Salk. 96. contra.
 (2) Com. Dig. tit. Attorney, C. 5. Beawes, Lex Merc. Maileyn, Lex Merc. (4) 9 Co. Rep. 76 b. Rol. Abr. 330. 2 Rol. Abr. R. pl. 3, 4. Cas. T. Hardw. 1. Stra. 705. 955. 1 T. R. 181. 6 T. R. 176, 7. Com. Dig. Attorney. Harrison v. Davison v. Robertson, 3 Dow. Jackson, 7 T. R. 209. Payley, Rep. 229. Porthouse v. Parker, 115.
 (3) See Co. Lit. 52 b. Com. Dig. Attorney, C. 5. Beawes, Lex Merc. pl. 86. Marius, 2 ed. p. 104. (5) 12 Mod. 564. Bac. Abr. Corporation, 9 ed. 4. pl. 59. Bro. Rex v. Brigg, 3 P. Wms. 432. Corp. 24. 34. 1 Rol. Abr. 514. Bac. Abr. Corporations, E. 3. Payley, 117.; and see 3 & 4 Ann. 5 East 239.
 (6) Plowden, 91. Vin. Ab. c. 9. acc. Bac. Abr. Authority, A. Corp. K. 2 Campb. 96.

matter in itself connected with its title or interest, but merely the ordinary course of its business. (1)

An agent's authority is frequently implied. As to what amounts to an *implied* authority is usually a matter to be collected from no one settled rule, but from the conduct of the principal, and the particular circumstances of the case; and this implied authority may arise, where the principal, by his former course of dealing, has sanctioned the inference, that the agent had authority for his conduct, though in fact it was contrary to his directions (2). Thus, if a servant has been allowed by his master frequently to purchase goods on credit, the master will be liable for what the servant purchases, though without his express directions (3). So, if a servant, usually employed to pledge goods or borrow money, pledge his master's goods for money, the lender may maintain an action of debt for it against the master (4). And we have seen, that if a married woman is permitted by her husband to carry on trade on her own account, and in her own name indorses a bill or note received in the course of such trade, an authority may be presumed from the husband (5). And where the master gave his servant money every Saturday to discharge the expences of the week, the servant purchasing the articles expended, and not having paid the money due for several weeks together, though he received it regularly each week, it was held the master was liable, on the ground that the master authorized the servant, in the first instance, to buy the articles on credit (6). But where, from the nature of the case, an authority cannot be implied, and no express authority is given by the master, he is not liable; as where a servant had, without his master's knowledge, negligently injured his carriage, and without any authority from his master took it to a coachmaker's to get it repaired, it was held that

(1) Co. Lit. 94 b. Salk. 191. pl. 3. Rex v. Bigg, 3 P. Wms. 423.

(2) See Chitty on Bills, 6 ed. 25. 5 Esp. Rep. 76. 2 Selw. 2 ed. 992.

(3) Show. 95. 3 Keb. 625. 10 Mod. 111. 1 Stra. 506; and see cases on same point, 1 Salk. 234. Peake, N. P. 48. Whitehead v. Tuckett, 15 East, 400. id. 38. 2 Stark. 281.; and see per Lord Eldon, 3 Dow. 229.

Beawes, pl. 86. Mar. 2 ed. 135. 3 Esp. N. P. C. 60. Neal v. Erving, 1 Esp. Rep. 61. Haughton v. Ewbank, 4 Campb. 188.

(4) 12 Mod. 564.

(5) Ante 43. Cotes v. Davis, 1 Campb. 485. Barlow v. Bishop, 1 East, 434. Anderson v. Sanderson, 2 Stark. 204.

(6) Sir R. Weyland's case, 4 Salk. 234. 1 Lord Raym. 225. 5 Esp. 76. 2 Selw. 2 ed. 992.

the master, who had not previously employed the coachmaker, was not liable for the repairs (1). And where the master is in the habit of paying ready money in advance for articles furnished in certain quantities to his family, if the tradesman deliver other goods of the same sort to the servant upon credit, without informing the master of it, and the latter goods do not come to the master's use, the latter is not liable. (2)

It frequently happens, that where the principal has furnished his agent with money to pay for goods to be purchased by the agent for him, the principal has the benefit and use of the goods, notwithstanding the agent's neglect to pay for them; here indeed, notwithstanding the agent's departure from his authority, the principal will be *prima facie* liable, unless he can shew that the credit was really given to the servant, or that he always gave the servant ready money to pay for the articles bought, and had not therefore ever authorized him to buy on credit (3). An implied authority may also arise though the agency has ceased, unless the parties giving credit to such authority either may be supposed to have had notice of the change, or from length of time, or other circumstances, ought not to have inferred that it continued; for a general authority to an agent is supposed to continue until its determination is generally or individually known; and therefore, after the discharge of a clerk or agent usually employed to draw, accept, or indorse bills or notes, the employer will be bound by his signature made after the determination of his authority, until the discharge be generally known (4). And though an agent so far exceed his principal's authority, as in the first instance to discharge the principal from liability, yet if the latter by any subsequent act assent to what the agent has done, he will thereby raise an implied inference that he gave him authority in the first instance, and he will be liable (5), and par-

(1) *Hiscox v. Greenwood*, 4 Esp. Rep. 174.

(2) *Pearce v. Rogers*, 3 Esp. N. P. C. 214. 1 Show. 95. and *Stubbing v. Heintz*, Peake, C. N. P. 47. 3 Esp. 48. 2 Esp. 509. 5 Esp. 76.

(3) *Paley*, 121. 5 Esp. 76.

(4) *Beawes*, pl. 231. *Molloy*, b. 2. c. 10. s. 27. p. 107. 282. *Bayley*, 123. 12 Mod. 346. 10 Mod. 110. 5 Barn. & Ald. 155.

Salte v. Field, 5 T. R. 215. When the authority of an agreement has been determined, it is advisable to publish it in the Gazette, as well as to give notice thereof to each individual who has previously dealt with the principal; notice in the Gazette not being in general sufficient to affect a former customer, unless he had had express notice. *Chitty on Bills*, 36. and cases there cited. (5) *Ward v. Evans*, *Ld. Raym.*

ticularly so, if with a knowledge of all the circumstances he adopts for a moment the agent's acts (1); and though a promise alone to pay a bill of exchange indorsed by an agent, would not support an action if the indorsement were contrary to authority, yet if the authority is doubtful such a promise is decisive (2). It seems that a small matter will be evidence of a subsequent assent (3), and an adoption of the agency in one part operates as an adoption of the whole act, for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder. (4)

Of the nature
and extent of
the authority.

As to the nature and extent of the authority which is given to the agent, it may be either *general* or *special*. A *general* agent is one who is authorized by his principal to transact all his business, either universally or in one particular department. A *special* agent is one who is authorized to execute for his principal only something in particular, and he is under a limited and circumscribed power. The difference in the effect of these two kinds of authority is this: that the principal is bound by *all* the acts of a *general* agent, which are not inconsistent with the nature of his employment, however prejudicial they may be to the principal, and even though the principal may have expressly forbidden the particular act upon which the question may arise (5). But no acts of a *special* agent beyond the limits of his authority, or necessarily implied by it, will bind the principal. The difference between these two agencies will be illustrated by the following instance: If a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still

930. *Rusby v. Scarlett*, 5 Esp. 78. *Boulton v. Hillerden*, Lord Raym. 224. 3 Salk. 234. Comb. 450. *Spittle v. Lavender*, 2 Brod. & B. 452. acc. *Fenn v. Harrison*, 3 T. R. 757. *Havard v. Baillie*, 2 H. B. 618. 6 East, 371. cont.

(1) Per Buller, J., in 2 T. R. 189. in notes.

(2) *Fenn v. Harrison*, 4 T. R. 177. *Paley*, 124.

(3) *Paley*, 124. n. k. and cases there cited.

(4) *Stra.* 859. *Paley*, 125. 1 *Barnard*, 77. 118. 136. 142. 284.

1 Atk. 128. *Hunter v. Prinsep*, 10 East, 378. 394. 7 East, 164, 6. 4 T. R. 211.

(5) *Caldwell v. Ball*, 1 T. R. 205. 3 Salk. 233. 1 *Ld. Raym.* 225. *Henley v. East Ind. Comp.* 1 Esp. Rep. 111. *Fenn v. Harrison*, 3 T. R. 757; and again tried 4 T. R. 177. *Goldsb.* 139. 10 Mod. 109. *Nickson v. Brockton*, 1 Salk. 289. *Bul. N. P.* 35. *Holt*, 46. 2 *Paley*, 139. *Olive v. Eames*, 2 Stark. 181. 5 Esp. Rep. 72; and see 2 *Ld. Raym.* 928. where the agency seems to be special.

the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant (1); but if the owner of a horse were to send a stranger to a fair, with *express* directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment (2). The authority, even of a special agent, may possess some of the characteristics of a general agency, that is, though he be appointed agent only for a specific purpose, the directions for effecting that purpose may not be specific (3); and in this case, upon the same principles which govern the case last cited, the principal will be responsible for all the acts done *bonâ fide* in the exercise of the discretionary agency (4), as far as that agency goes, however imprudent or injurious the acts may be (5). As if a person be directed to get a bill discounted, and he has received no directions to the contrary, he may indorse the name of his employer (6); or if a servant be directed to sell a horse, and receive no express directions not to warrant, his master will be bound by his warranty. (7)

The nature of an agent's authority must depend upon the express or implied directions or consent of the principal, and in the construction thereof regard must be paid to the intention of the principal, and the nature of the commission. A general agent therefore is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect; and although a factor may sell goods upon credit, that being the ordinary course of conducting mercantile affairs, yet a stock broker, though acting *bonâ fide*, and with a view to the benefit of his principal, cannot do so with stock, unless he have special instructions to that effect, that being contrary to the usual course of business (8). Whether an agent has a general or

(1) Per Ashurst, J. Fenn v. Harrison, 3 T. R. 757. (6) Fenn v. Harrison, 4 T. R. 177.

(2) See 1 Camp. 43. n. but see 5 Esp. Rep. 75. (7) Hellyear v. Hawke, 5 Esp. Rep. 75. 1 Camp. 258. 3 Esp. 65.

(3) Chitty on Bills, 6 ed. 23. Runquist v. Ditchell, 2 Campb. 555.

(4) 4 Esp. Rep. 114. (8) Wiltshire v. Simmons, 1

(5) 1 Campb. 43. Paley, 146. Campb. 258. 1 Campb. 43 n.

only a special authority is properly matter of evidence for a jury (1); though it is the province of a court to decide on the effect of the terms of a deed, or other instrument (2). An authority is to be so construed as to include all necessary or usual means of executing it with effect. It has been decided, that a person signing his name on a blank stamped piece of paper, and delivering it to T. S., authorizes T. S. to insert any sum which the amount of the stamp will warrant (3). And so where one gives a power of attorney to another (4), to demand and receive all monies due to him on any account whatsoever, and to use all means for the recovery, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, and to transact all other business, the latter words must be understood with reference to the words preceding, as meaning all business *appertaining* to the receipt of the monies. And where the power to the agent was a power for receiving money, and concluded with the general words, "to transact all business," it was decided that the power to transact business did not authorize the agents to indorse the bill they had received under it. The court said, the most large powers must be construed with reference to the subject matter. The words, "all business," must be confined to all business necessary for the receipt of the money (5). A general power to buy or sell binds the person giving it as to all others dealing *bonâ fide*, however disadvantageous the terms of the contract may be (6). A special authority, however, must always be strictly pursued (7). But inasmuch as a power to do any act comprizes a power to do all such subordinate acts as are usually incident to, or are necessary to effectuate the principal act in the best and most convenient manner (8), it is necessary, even in regard to a special agent, if it is intended to exclude from his authority any circumstance which would otherwise fall within it, that it

(1) Thorold v. Smith, 11 Mod. 88.

(2) 1 Hen. Bla. 313. 2 Hen. Bla. 618.

(3) Collis v. Emmett, 1 H. Bla. 313. 2 H. Bla. 618. Russell v. Langstaffe, Dougl. 496. 514.; see also Snaith v. Mingay, 1 M. & S. 87. Crutchley v. Mann, 5 Taunt. 529. 1 Marsh. 29. S. C. Crutchley v. Clarence, 2 M. & S. 90. Chitty on Bills, 6 ed. 24.

(4) Hillyear v. Finlyson, 1 H. Bla. 155. Howard v. Baillie, 2 H. Bla. 618.

(5) Hay v. Goldsmidt, and Hogg v. Snaith, 1 Taunt. 349. 2 Smith's Rep. 79.; and see Murray v. East Ind. Comp. 5 Barn. & Ald. 204.

(6) Ambl. 498. Payley, 145. 13 Vin. Ab. 6.

(7) Id.

(8) 2 H. Bla. 618. Payley, 137. 146. 1 Campb. 45.

should be done by express directions. If a master, as we have seen, entrusts his servant to sell a horse, and gives no directions as to warranting it, he is bound by the warranty of the servant (1); but not so, if he expressly directed the servant not to warrant (2). In the construction of the extent of the authority in many mercantile agencies, upon which there has been no decision, the facts may, in some cases, be left for the opinion of a jury (3), and regard must be paid to the usages of trade, and for this purpose the evidence of mercantile persons is consulted. (4)

Having taken this general view of the modes in which agents may be appointed, and the nature of the different degrees of authority with which they may be invested, we will now proceed to take a more particular view of the most important decisions relating to the rights and liabilities of the principal or employer, and to the rights and liabilities of the agent himself; *first*, with respect to third persons, and *secondly*, as between each other. In general, all contracts entered into by a party, through the intervention of an agent properly authorized, may be taken advantage of by him (5); though in point of law the principal and his agent are considered as one and the same person (6), yet the principal is the person who should be regarded in the entering into and execution of such contracts. Thus a sale by a factor creates a contract between the owner and buyer, and this rule holds even in cases where the factor acts upon a *del credere* commission. (7) Hence if a factor sells goods, and the owner gives notice to the buyer to pay the price to him, and not to the factor, the buyer will not be justified in afterwards paying the factor, and the owner may bring his action against the buyer for the price, unless indeed the factor has a lien thereon (8); and though an agent departs from his authority, so as to discharge the principal, or the agent does not disclose his principal's name, yet

Rights and liabilities of principal with regard to third persons.

(1) Ante, 198, 9. Helyear v. Hawke, 5 Esp. 75. 3 Esp. 65. 2 Campb. 555.

(2) Id. *ibid*.

(3) 11 Mod. 88. Payley, 148.

(4) See ante, 106. As to construction of contracts, Ambl. 185. Willes, 407. 1 Campb. 259. 12 Mod. 514.

(5) Godb. 360. Payley, 225.

(6) 1 T. R. 205.

(7) 2 Stra. 1182. 4 Bac. Abr. Merchant, C. Cowp. 255. Cooke's Rep. ch. 8. s. 15. 1 Atk. 248. 1 T. R. 113. 7 T. R. 360. Sed vid. Bull. N. P. 130. Escot v. Melward. Co. B. L. 1 Esp. N. P. 107. 3 B. & P. 489.

(8) Drinkwater v. Goodwin, Cowp. 251. Bull. N. P. 130. George v. Clagett, 7 T. R. 359.

the latter may in general adopt the contract, and sue for any breach of it (1); but there must in all cases exist an authority which must be collected from the nature and circumstances of the case under which the contract was entered into. (2) Contracts indeed, made for the benefit of another, though without his actual privity or direction, may be rejected or affirmed at his election, but some degree of agency, however trifling, must always exist. By making the election, he adopts the agent's contract, and will be liable. (3) We have just seen that even under a *del credere* commission, the buyer is not justifiable in paying the price to the factor, if he has had notice from the principal not to do so. But in cases where the buyer at the time of the sale knows nothing of the relation between the factor with whom he deals, and the principal by whom that factor is employed, the buyer will be protected by the law, in case of misadventures occurring by the default of the factor; and therefore, where a factor acting under a *del credere*, or the usual commission, sells goods as his own, and the buyer does not know that any principal exists, the buyer will be permitted, in an action brought against him, to set off a debt due to him from the factor (4); and indeed it is much more just, that where two persons equally innocent are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser. (5) But this rule does not hold in the case of a broker employed under the usual commission, on the ground of the difference between the characters of factor and broker, for in general the principal by his conduct allows the factor to hold himself out to the world as the owner of the goods, by suffering him to have them in his possession, and the principal must take the consequences of the factor's misconduct in the sale. But a broker is not trusted with the possession of the goods, and in general nothing is given him by the principal, whereby he can appear as the owner thereof, or have a right to sell them in his own name; and therefore, where such broker sells goods without dis-

(1) *Taylor v. Sir T. Plumer*, 3 M. & S. 562. 2 Stark. 443. seal. 7 T. R. 359.

(2) See *Bull. N. P.* 130. *Bell v. Jutting*, 1 Moore, 155. *Godin v. The London Assurance Comp.* 1 Burr. 489. (4) *George v. Clagett*, 7 T. R. 359. 3 T. R. 454. 1 *Ld. Raym.* 101. 1 *Campb.* 444. 2 *Campb.* 22. 343. 6 T. R. 176. 4 M. & S. 566. 2 *Stra.* 1182.

(3) 16 East, 2 *Stra.* 859.; and see 6 T. R. 176. case of husband (5) *Guerreiro v. Peile*, 3 *Barn. & Ald.* 616.

closing the name of his principal, he acts beyond the scope of his authority, and the vendee reposes more confidence in him than he ought to do, and therefore the buyer cannot set off a debt due from the broker to him against the demand for goods made by the principal (1); and if an agent do not disclose the name of his principal, and some prejudice arises to the buyer in consequence of such concealment, the principal cannot sue. (2) It should be here observed, that where the principal resides abroad, he is presumed to be ignorant of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties. (3)

The risk which a principal thus runs, through the inadvertence or misconduct of his agent, may be avoided by the purchaser's having notice, at any time before the completion of the purchase or delivery of the goods, of the agent's commission, and no custom it seems can be set up to contravene the effect of this notice (4). The fact of the buyer's having such notice must necessarily depend upon the circumstances of the case, and it may be collected from small matters. (5) It has been held that the mere general knowledge of the seller being a factor is not sufficient to deprive the buyer of the privilege of set off, without express knowledge before the contract was completed that he acts as agent in that particular instance, because a man who is in the habit of selling for others may nevertheless sell his own goods. (6) Circumstances which shew collusion between the factor and buyer, as the insolvency of the factor known to the buyer, would be *prima facie* evidence of notice. (7)

All the contracts of an agent, made within the scope of his authority, bind the principal; the owner of a ship is liable for the repairs (8), or other necessaries (9), done or furnished by the master's or captain's order, and he is even liable for money borrowed (10),

(1) *Baring v. Corrie*, 2 Barn. & Ald. 137. 1 Moore, 157. Sed vid. 11 East, 36. 2 Campb. 343. 1 Campb. 109. 180.

(2) 2 Stark. 443.

(3) 3 Bos. & Pul. 490.

(4) *Peake's Rep.* 177.

(5) *Manns v. Henderson*, 1 East, 335.

(6) *Moore v. Clementson*, 2 Campb. 22.

(7) *Escot v. Melward*, 7 T. R. 361 (b).

(8) *Garnham v. Graham*, Stra. 816. 4 Barn. & Ald. 352.

(9) *Rich v. Coe*, Cowp. 636. *Hoskins v. Layton*, Cas. Temp. Hard. 376. 2 Vern. 643.

(10) *Evans v. Williams*, Abbott on Shipping, 117. *Cary v. White*, Brown, P. C. 325.

or any other act done (1), by the master or captain for the necessary use of the ship, the authority in these cases being implied. Public boards and agents of government bind it by their contracts, if done within the authority granted to them (2). But in the construction of this liability strict attention must be paid to the extent of the agent's authority, and that he has not deviated from it in such a degree as to discharge the principal. In the instance before mentioned, as to the owner of a ship, he will not be liable if the repairs or other articles furnished for the use of a ship were not actually necessary; neither would he be liable for the money borrowed, nor for such other act of the master or captain, unless urgent cases should require it (3). And where the authority is particular, the agent must pursue it, and if the act varies from the authority, what he does is void (4) as to the principal, unless the variance be merely circumstantial (5). A transfer of property by an agent, not authorized by his commission so to do, passes no property in the thing transferred, and it may be reclaimed by the owner; as if a master trusts his servant with plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser (6). Where a factor is employed to pay money for his principal to a third person, and the third person, instead of taking the money, takes only the security of the factor, without the knowledge of the principal, giving to that factor a receipt as for the money due from the principal, in consequence of which the principal, unaware of the fact, is induced, in his accounts with the factor, to allow him as for money paid; in such circumstances, if the security given by the factor to the third person prove invalid, the principal is nevertheless discharged. (7)

A factor or agent, who has power to sell the merchandize of his principal, has no power to affect the property by tortiously

(1) *Id. ibid.* 1 Stark. 490. The mortgagee of a ship is not liable for these things if done or furnished previous to his taking possession of her. *Jackson v. Vernon*, 1 Hen. Bla. 114. 2 Campb. 42. 11 East, 435. A captain cannot in general sell the ship. *Freeman v. East Ind. Comp.* 5 B. & A. 617.

1 Dowl. 252. S.C.

(2) 6 Price, 287.

(3) See note (1).

(4) 6 T. R. 591.

(5) 2 Hen. Bla. 623.

(6) See 2 Barn. & Ald. 137.; and see Co. Lit. 258.

(7) *Wyatt v. Marquis of Hertford*, 3 East, 147. 8 T. R. 451.

pledging it as a security or satisfaction for a debt of his own (1); and it is of no consequence that the pledgee is ignorant of the factor's not being the owner (2). And when goods are thus pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor or agent what may be due to them, and without any tender to the pawnee of the sum for which the goods are pledged (3), or without any demand of such goods (4); and it is no excuse that the pawnee was wholly ignorant, that he who pledged the goods held them as a mere factor or agent (5); unless, indeed, where the principal has held forth the agent as the principal (6). But it seems that a factor, who has a lien on the goods of his principal, may deliver them over to a third person, as a security to the extent of his lien, with notice of his lien, and may appoint such third person, as his servant, to keep possession of the goods for him; and in that case the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged (7). So a sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and buyer, and the thing sold may be recovered in an action of trover. (8) A principal is bound by the act of his agent, where his former course of dealing sanctions the inference that the agent had authority for his conduct, though in fact it was contrary to his direction (9). The sale by a broker, whose ordinary business is to sell goods placed by the owner in his possession, generally

(1) *Paterson v. Fash*, Stra. 1178. *Manns v. Henderson*, 1 East, 337. *Newson v. Thornton*, 6 East, 17. 2 Smith, 207. *McCombie v. Davies*, 6 East, 538. 7 East, 5. *Daubigny v. Duval*, 5 T. R. 604. 1 Maule & S. 140. *Id.* 147. 2 Stark. 539. 8 Taunt, 100. 1 Stark. 472. 2 Stark. 21. *Guichard v. Morgan*, 1 Gow. C. N. P. 2 Brod. & Bing. 639.

(2) 5 Ves. jun. 213. 6 East, 17.

(3) *Daubigny v. Duval*, 5 T. R. 604.

(4) 6 East, 538. 12 Mod. 514.

(5) *Martini v. Coles*, 1 Maule & S. 140.

(6) *Id.* 147.

(7) *Hatsop v. Hoare*, Stra. 1187. *Daubigny v. Duval*, 3 T. R. 604. *Combie v. Davies*, 6 East, 538. 7 East, 5.

(8) *Payley, P. & A.* 149. 12 Mod. 514. Courts of equity will compel the holder of property under these circumstances to give an account of the property he holds. 3 Ves. 226.

(9) *Whitehead v. Tuckett*, 15 East, 400.

is binding. (1) Where the money of the principal has been applied by the agent to some illegal or unlawful purpose, and without the principal's privity or consent, it may be recovered back again from the party who holds it. (2)

Sub-agents.

An agent cannot delegate his authority to another, so as to bind the principal by the acts of the sub-agent (3); but if an express authority be given to employ a sub-agent, or where the usual course of management of the principal's concerns, in the employment of a sub-agent, is pursued for a length of time, and recognized by the owners of property, they will be taken to have adopted the acts of the sub-agent, as the acts of the agent himself (4), and will be liable.

**Demand, notice,
&c. by agent.**

All the acts of an agent, which have been expressly or impliedly authorized by the principal, enure to his benefit or disadvantage. The demand of a debt by a known clerk of a creditor is sufficient to make an act of bankruptcy by denial (5). But where a demand or notice, or any other proceeding conveyed and adopted by an agent, is intended to affect a third person with damages for non-compliance therewith, it is necessary that the agent should be expressly authorized at the time he acts, and no subsequent sanction of the principal will give it effect (6); therefore, where the defendant had tendered his debt, which the plaintiff refused to receive, and the plaintiff made a subsequent demand through his agent, when the defendant refused to pay it, on the ground that the agent could not shew any express authority in writing or otherwise, it was held that the plaintiff could not avail himself of such demand (7). An agent however, having a sufficient and express authority, need not in such cases, unless required so to do, produce it (8). In some cases indeed, where an act has been done by an agent without any express authority, for the benefit of his

(1) *Pickering v. Bush*, 15 East, 38. 4 East, 85. *Id.* 107. 1 Bos. & Pul. N. R. 214. 3 East, 381.

(2) *Clarke v. Shee*, Cowp. 197.; *see Jaques v. Golightly*, 2 Bla. 1073. 498. 6 East, 371. 380.

(3) *Blore v. Sutton*, 3 Mer. 237. *Payley*. 128. *Combe's case*, 9 Co. 75. 77 b. 1 Rol. Abr. 330. (7) *Coare v. Callaway*, 1 Esp. C. N. P. 115. *Id.* 269.; and see 7 East, 364. *Beawes*, pl. 87. *Coles v. Bell*, 1 Campb. 478. *Payley*, 225. 1 Esp. C. N. P. 83.

(4) *See ibid.* *Pattison v. Ord*, Bunb. 166. (8) *Roe v. Davis*, 7 East, 364.

(5) *Co. B. L.* 79.; and see

principal, and where no immediate act is to be done upon it by a third person, the principal may afterward adopt or reject it, as in the case of a continual claim made, or an entry to avoid a fine by such an agent. (1)

A promise, representation, or admission made to an agent relative to any transaction in which an agent is engaged, and where it can be presumed to have been made to him in his character of agent, will enure to the benefit of the principal (2). The delivery of goods to an agent so far vests the property in the principal as to conclude the vendor's right to stop them *in transitu*, for it is not necessary to determine the *transitus* that the goods should come to the corporal touch of the vendee (3). But in the application of this rule, it is necessary to discriminate precisely between those agents who are merely employed in assisting the passage, from those by whose possession the passage is at an end, so that goods require a fresh direction to put them in motion. (4)

Promise, &c. to agent.

Delivery of goods.

In general a payment to an agent authorized to receive it is equivalent to payment to the principal (5). In the case of payments, however, upon written securities, the debtor is always bound to see that the party to whom he pays it is in possession of the security (6); and payment, it seems, to an agent not in possession of such security, will not bind the principal, unless, indeed, some special authority from the obligee be shewn, which would be sufficient without possession of the security. (7)

Payments to agents.

(1) Payley, 227. Co. Lit. 258 a. Stra. 1108.

(2) Godb. 360.; and see Bull. N. P. 130. 16 East, Warrant, Campbell.

(3) Ellis v. Hunt, 3 T. R. 464. Payley, 229. 189. 20 Mbd. 310. 2 Mod. 308. Stra. 503. Bull. N. P. 72. Ld. Raym. 792. 2 Esp. C. N. P. 509.

(4) Fowler v. McTaggart, 7 T. R. 442.; and see Payley, P. & A. 229. 235. n. (b.) Ante, 128.

(5) 7 Ves. jun. 470. 14 Ves. 144. Loft. 593. Payment to an attorney regularly appointed is sufficient. 1 Bl. Rep. 85. But not so to his agent or clerk.

Dougl. 600. An agent in town, however, by taking money out of court binds the plaintiff, though the payment into court was irregular, and notice had been given by plaintiff's attorney to the defendant, that he should not take it out. 1 T. R. 710. Payment to a factor in the course of his business, and without notice from the principal, in general discharges the debtor, if the usual mode of dealing warrants such payments. Cowp. 256. 2 Camp. N. P. C. 24.

(6) 1 Chan. Cas. 93. in note. Id. 94. 2 Eq. Ca. Abr. 709. 2 Freem. 289.

(7) Id. *ibid.* Payley, 180.

In ordinary cases the mere production of a bond (1), bill of exchange, note, or check is, in general, sufficient to warrant the payment to the person who produces it, and this without reference to the circumstance of his being the habitual agent of the same party (2). But the presumption of authority from the possession of the instrument may be repelled by evidence of its being obtained by fraud, or for some other special purpose than receiving payment (3). Though an agent be not actually possessed of such security at the time of the payment to him, yet if the principal afterwards deliver it over to him, to return to the obligor, this subsequent act confirms the propriety of the payment to the agent, so far as to bind the principal, although the principal never receives the money (4). Wherever payment to an agent would be sufficient to discharge the payer, where he is authorized to receive it, a tender to him has the same effect as a tender to the principal in person (5); but a payment by one party to the other's agent, before the time appointed, and without the other's consent, is at the risk of the payer. (6)

Tender.

Release, &c. of.

So the release, discharge, or composition by an agent of his principal's debts or affairs, will be binding on the principal, provided it be done according to the agent's authority, and is warranted by the usual course of trade. (7)

Representations,
&c. made by
agent.

Representations made by an agent respecting a particular contract or act, in which he is at the time of the representation engaged, bind the principal (8). But where a purchaser, after the delivery of the abstract, having made an objection thereto, entered into possession, and thereby waived it, and the clerk of the vendor's solicitor, without any express authority, made an offer of compensation, it was held that such offer was of no effect (9).

(1) 1 Salk. 157. 2 Eq. Ca. Abr. 709.; but otherwise if a mortgage deed, upon which only the interest can be received by the agent, but not the principal. Id. ibid.

(2) Owen v. Barrow, 1 New Rep. 103. 12 Mod. 564. Paley, 181. Chitty on Bills, 6 ed. 281.

(3) Paley, 181.

(4) Abington v. Orme, 1 Eq. Ca. Ab. 145.

(5) 1 Camp. 477.

(6) Parnther v. Gaitskell, 13 East, 432.

(7) 11 Mod. 88. 71. 10 Mod. 109. 2 Long Raym. 930. 2 Salk. 442. Dr. & St. 286. Say, 259. 1 Bac. Abr. 208. 1 Ch. R. 104. 1 Ch. Ca. 86. 2 ed. 2 Vern. 127. 2 Esp. C. N. P. 269. Moor, 618. Salk. 70. 12 Mod. 121. 1 Ld. Raym. 246. 8 T. R. 371. 7 Ves. jun. 617.

(8) Peto v. Hague, 5 Esp. 135. Id. 72. 1 Gow. C. N. P. 45.

(9) Burnell v. Brown, 1 Jacob and W. 168.

And the declarations and admissions of an agent concerning a transaction in which he is at the time of the declaration and admission employed, and where they form part of the contract, and within the scope of the agent's authority, either expressly or impliedly, are evidence against the principal:—Thus an acknowledgment by an agent of the cause of action will bar the statute of limitations. (1) So does the concealment of any particular and material fact by the agent at the time of his entering into a contract equally affect the principal, as though he took part in the concealment.* (2) Notice to an agent in the transaction in which he is engaged for his principal, will charge the principal himself, because it is a presumptive notice to him (3); but notice in order to affect the principal, in respect to a contract concluded by the interposition of an agent, must be to an agent empowered to treat, and not to one who is merely employed to carry proposals from one side to the other. (4)

Though a principal is not in general liable criminally for the act of his agent, yet he is civilly liable for the neglect (5), fraud, deceit (6), or any other wrongful act (7) of his agent in the course of his employment, though in fact the principal did

(1) 5 Ex. Cas. 72. 134. 145. 2 ed. 211. 1 ed. 375. *Biggs v. Lawrence*, 3 T. R. 454. *Sed vide Bainsurman v. Radences*, 7 T. R. 663. as to latter case; and see *Fairlie v. Hastings*, 10 Ves. jun. 123. *Betham v. Benson*, 1 Gow. 45. 4 Taunt. 511. *Id.* 565. *Id.* 662. 1 Price, 258.

(2) *Stra.* 1183. *Beawes*, 266. *Park on Ins.* 207. & 209. 1 T. R. 12.

(3) 1 Ch. Ca. 38. *Amb.* 624. 2 Bro. P. C. 596. 13 Ves. 120. 1 Ves. 62. 1 T. R. 16. 4 T. R. 66. 3 Atk. 646. 2 Vern. 574. *Id.* 609. *Gilb. Rep.* 7. 1 Vern. 286, 7. 2 Atk. 139. 3 *Id.* 291. 14 Ves. 426. 3 *Merivale*, 210. 27. 2 *Fonbl.* 151. *Payley*, 170. Notice to purchaser's agent of incumbrance in sale of an estate, the purchase being under sanction of court of chancery, will charge purchaser. 3 *Mer.* 210.

(4) 1 Br. C. C. 351. *Forster* W. 168. 4 Taunt. 873.

(5) 2 *Stra.* 885. *Rex v. Stone*, 7 T. R. 29 H. 6. 31. 1 Salk. 18. *Rex v. Dixon*, 3 M. & S. 11.

(6) *Hern v. Nichols*, 1 Salk. 289. *Cro. Jac.* 473. 1 *Stra.* 653. *Roll. Abr.* 95. l. 15. v. 2 *Molloy*, 330. *Bridgm.* 126, 7. *Sed vide Com. Dig. Action on the Case for Deceit, B* As to when this doctrine attaches to public officers, see *Payley*, 193. and cases there cited.

(7) *Sayer*, 41, 2. 1 *Stra.* 505. 12 *Mod.* 521. 1 *P. Wms.* 596. 2 T. R. 97. 2 Salk. 411. The previous command or subsequent assent of the principal to the trespass of his agent makes him liable. See 1 *Chitty on Pl.* 183. 4 *Inst.* 317. *Bro. Tresp.* 113. 118. 307. 2 *Bla. Rep.* 245. *Id.* 866. *Com. Dig. Trespass, C. 1.*

not authorize the practice of such acts (1); but the wrongful or unlawful acts must be committed in the course of the agent's employment (2). And if a party superintends and directs the acts of an agent, he thereby releases the principal from liability, and cannot sue him for any wrongful act of his agent. (3)

Rights of agents
with regard to
third persons.

In general a mere servant or agent with whom a contract is made on behalf of another, cannot support an action thereon (4); and therefore, where A. agreed in writing to pay the rent of certain tolls which he had hired, to the treasurer of certain commissioners, it was decided, that no action for the rent could be supported in the name of the treasurer (5); and a captain of a ship cannot maintain an action in his own name upon an implied promise to pay demurrage, though he may on an express contract to pay it (6). But when an agent has any beneficial interest in the performance of the contract for commission, &c. as in the case of a factor or broker (7), an auctioneer (8), a policy broker whose name is on the policy (9), or the captain of a ship for freight (10), or where he has exceeded his authority, and thereby made himself a principal; and in some cases where he has rendered himself liable to his principal by his negligence or otherwise, as if he mispay money under circumstances which give a right to recover it back (11); he may bring the action in his own name, though the principal or owner in all these cases might sue. And any agent who has the possession of his principal's property, and is not a mere bailee, but has some interest therein, may bring an action for any injury affecting the posses-

(1) 12 Mod. 490. 1 Ld. Raym. 264. Bac. Abr. Master and Servant, K. 2 Lev. 172. Salk. 13. 6 T. R. 661. 2 Salk. 441. pl. 2. 8 T. R. 188. 1 Wils. 282. 8 T. R. 533. 3 Mod. 520.

(2) 1 Salk. 282. Rep. Temp. H. 85. 194. Abbot, 109. 2 Leon. 75. Plow. 18. Cro. Eliz. 437. Skin. 228. Bac. Abr. Master and Servant, K. 27 Ed. 3. st. 2. c. 19. 1 East, 106. 6 T. R. 125. Bac. Abr. tit. Trespass. 435. 2 Stark. 438. Holt. C. N. P. 531.

(3) 2 Stark. 377.

(4) 3 Bos. & Pul. 147. 1 Hen. Bla. 84. Owen, 52. 2 New. Rep.

411 a. 1 Chitty on Pleading, 5.

(5) 3 Bos. & Pul. 147.

(6) 4 Taunt. 1. 52.

(7) 1 T. R. 112. 2 Esp. R. 493. 1 Hen. Bla. 82. 7 T. R. 359. 11 East, 180. 4 Camp. 195. 1 M. & S. 581. 1 Atk. 248. 3 Bos. & Pul. 491.

(8) 1 Hen. Bla. 81. 2 Marsh. 497. 501.

(9) Park. 403. 1 T. R. 114. 2 M. & S. 485, 486. 2 Esp. 493. But not otherwise. 1 M. & S. 497. 15 East, 4. Cossack v. Wells, 1 Chitty, on Pl. 5 n. t.

(10) 6 Taunt. 65. 4 Taunt. 189.

(11) Cowp. 805.

sion (1). When a factor or any other agent has a lien upon goods entrusted to him for sale, and which he has sold pursuant to that trust, the lien attaches upon the price, and the factor has a right to enforce the payment of the money to himself, in opposition to the claim of the principal (2). But to entitle the agent to this privilege, the debtor should have notice of this lien previously to his payment over to the principal, and the agent is bound to offer an indemnity (3). If an agent is answerable to his principal for the payment of the price of goods sold, or any other debt, he may claim the right of suing for it, as an agent acting under a *del credere* commission, in which case, indeed, he may be considered as the owner of the goods (4). Where there is an express contract under seal with the agent, and his signature to the same is general without any qualification of his acting as agent, or where the credit is given to him alone, he alone can sue and be sued. (5)

An agent, acting as such, is not in general liable to be sued upon the contracts which he makes on behalf of his principal (6); but the agent is liable in cases of contracts entered into by him, where the principal is not known to the other party at the time of making the contract, though it is known that the agent acts in a representative character, as an auctioneer not disclosing the principal's name at the time of the sale (7); or where there is no responsible principal to resort to, as where the commissioners of a navigation act entered into an agreement with the engineer (8), or where the agent enters into an agreement as if he were the principal, and the credit is given to him, though he describe himself as agent, and particularly in contracts under seal, he is personally liable, and he alone can be sued (9). And where the solicitor of the assignees of a bank-

Liability of the agent to third persons.

(1) 1 Hen. Bla. 81. 1 Chitty on Pl. 51. 4 East, 211.

(2) Cowp. 256. 2 Esp. 493.

(3) Cowp. 255.

(4) 3 Bos. & Pul. 489.

(5) 3 Camp. 320. 5 East, 148. 1 Smith, 361. 2 East, 142. 1 T.R. 674.

(6) 12 Ves. 352. 15 East. 62. 66. 3 Camp. 317. 2 M. & S. 438. Even for a deceit. 3 P. Wms. 278. 1 Bla. Rep. 670. 1 Chitty on P. 25. n. k. l. m. and cases there cited.

(7) 12 Ves. 352. 15 East, 62.

7 T. R. 350. 2 Esp. Rep. 567.

Peake, C. N. P. 120. Bull. N. P.

130. 2 Moll. 331. 3 Camp. 317.

1 T. R. 181. Burr. 1921.

(8) Payley, 251. Amb. 769.

770. 772. 1 Br. Ch. R. 101.

Hardw. 205.

(9) 5 East, 148. 1 Smith, 361.

2 East, 142. 6 T. R. 176. 1 T. R.

674. 15 East, 62. 6 Taunt. 147.

1 Marsh. 500.

rupt, upon whose lands a distress had been made by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained," it was held they were personally liable (1); but this must be collected from the instrument, and reasonable exposition of the whole as it stands (2). So where an agent individually binds himself, as if a servant lease land for his master, reserving the rent to his master, and to invite the lessee to take the lease promise that he shall enjoy it without incumbrance, if the land be encumbered, an action lies against the servant (3); and masters of ships are liable for necessities, &c. furnished abroad or in this country, unless they were furnished on credit of the owners (4); and where an agent does not pursue, in any degree, the principal's authority (5), or so far exceeds it as to discharge the principal from responsibility for his acts (6); or where he acts under an authority which he knows the principal has no right to give, as an agent selling property under a notice that it does not belong to his principal, he is personally liable (7). So where an agent has been authorized to do an act for a third party, and he is put in possession of every thing that will enable him to complete it, and he neglects so to do, he will be personally liable to the third person; as if an agent receives money from his principal to pay to A., and engages to A. to pay him, the latter may sue him on his neglect to pay it, for the agent is considered

(1) 3 Barn. & Ald. 47. 2 Taunt. 374. 2 Taunt. & B. 452. 2 Moll. 331. 2 Atk. 623. 2 Barnard, 320. 2 Strange, 955. 1 Bos. & Pul. 368. 1 T. R. 172. 6 T. R. 176. 1 Smith, 361. 5 East, 148. 1 Stark. 14. To avoid this liability in cases of bills, &c. the party must state on the face of the bill that he acts as agent. Chitty on B. 6 ed. 133. So in deeds to secure himself from liability as such agent, the deed must distinctly express that he is only acting therein as agent, since no evidence to controul its purport will be received. This may be done by writing opposite the seal "For C.D. (the principal)," "A.B. his attorney." 2 East, 142. 1 T. R. 674.

(2) 2 Taunt. & B. 452. 2 Taunt.

374.

(3) 1 Rol. Ab. 95. l. 30. 2 Rol. Rep. 270. 3 T. R. 761. 1 Com. Dig. 240. Dyer, 230 a. Yelv. 137. 4 B. & A. 88. Aley, 6. 5 Esp. Rep. 247. 2 Bla. 107. Stra. 955. 1 Gow. 117. 5 East, 148. 1 Marsh. on Ins. 204.

(4) Cowp. 639. Stra. 816. 7 T. R. 312. Abbott, 1 ed. 95. Carth. 58.

(5) 1 Eq. Ab. 308.

(6) 3 T. R. 761. Beawes, 43. Esp. N. P. C. 111. 3 P. Wms. 279. 2 Vern. 127. Eq. Cas. Ab. 25. 5 Barn. & Ald. 34. 2 Taunt. 386. Amb. 498. 10 Ves. 400.

(7) Cowp. 565, 6. 4 Burr. 1984. Bull. N. P. 133. Lord Raym. 1210. 4 T. R. 558. Stra. 480. 10 Mod. 23. 1 Taunt. 359. 2 Taunt. 386.

to hold it on the party's account (1). But if the third party, by their conduct, shew they do not consider the agent as holding the money on his account, the agent will be discharged, on properly appropriating the money to other purposes before he is again called upon by the third party to pay it over. (2)

If a party who has paid money to an agent on account of his principal, becomes entitled to recal it, he may sue the agent, provided he has not paid it over to his principal, or no change since the payment has taken place in the agent's situation before notice of such right to recal the money, and the mere passing of such money in account with his principal, or making a rest without any new credit given, fresh bills accepted, or further sum advanced for the principal in consequence of it, is not sufficient for the agent to avoid this liability (3). But in general if the money be paid over by the agent before notice to retain it, he will not be liable, and the remedy is against the principal, except, indeed, where the agent's receipt of the money was obviously illegal, or his authority wholly void (4). The payment must always be to the real principal, and not a party falsely assuming that character (5). The agent, in all these cases, may avail himself of the same defence as his principal might have done (6). The *agents of government* enjoy a peculiar exemption from responsibility; an officer appointed by government, avowedly treating as an agent for the public, is not liable to be sued upon any contract made by him in that capacity, whether under seal or by parol, unless he make an absolute and unqualified under-

(1) 14 East, 590. 2 Roll. Rep. 441. 1 Barn. & Ald. 36. 1 Moore, 74. 3 Price, 58. 16 Ves. 443. 5 Esp. 247. 4 Taunt. 24. 1 Stark. 123. 143. 150. 372. 1 Hen. Bla. 218.

(2) Holt, C. N. P. 372.

(3) 3 M. & S. 344. Cowp. 565. Stra. 480. This right to sue the agent must be considered with some qualification. An action does not lie against a mere collector, trustee, or receiver, for the purpose of trying a right in the principal, even though he has not paid the money over. 4 Burr.

1985. Payley, 261.; and cases there cited; and see 1 Selw. N. P. 103. ed. 7. 1 Campb. N. P. C. 396. 1 Marsh. 132. Holt, C. N. P. 641.

(4) 1 Stra. 480. Cowp. 69. 568. 1 Vern. 136. 208. 4 T. R. 553. 4 Burr. 1986. Dougl. 670. 5 Burr. 2639. 5 Esp. Rep. 103. 3 M. & S. 344. Ld. Raym. 1210. 2 Esp. 507.

(5) 1 T. R. 60. 2 Ld. Raym. 1210. 1 Salk. 27. 4 Burr. 1984. 3 T. R. 125. 1 Ld. Raym. 762.

(6) 1 Campb. Rep. 372.

taking to be personally responsible (1), and though public money actually passes through his hands, or that of his agent, for the purpose, or with the intent, that it should be applied to the fulfilment of his fiduciary undertakings, he is not personally liable. (2)

An agent cannot, in general, be sued by a third person for any neglect or nonfeasance which he is guilty of, when it is committed on behalf of, and under the express or implied authority of his principal; thus if a coachman lose a parcel, his master is liable and not himself (3), neither is he liable for any deceit or false warranty in the case of a sale (4); but he is liable for all tortious acts and wilful trespasses, whether done by authority of his principal or not (5); as if goods are delivered to A. to keep, who delivers them to B. to keep to the use of A., and B. wastes or destroys them, the owner may have an action on the case against B., for the agent thereby becomes a wrongdoer (6). And in every case where the master has not power to do a thing, whoever does it by his command is a trespasser. (7)

To discharge a party from liability for malfeasance and nonfeasance, on account of agency, he must shew that he was actually an agent, and not nominally such, for if he be really a person standing on his own footing, and always looked upon as if he were a principal, he will be liable. Thus an action lies against a deputy post-master for the loss of a letter (8). And an agent who is merely employed to retain or look after another agent is not liable for any act of the latter. (9)

Rights and
liabilities of
principals and
agents *inter se*.

The present chapter has, hitherto, been employed in the consideration of the situation in which the agency places either the

(1) 1 T. R. 172. Id. 674. 1 East, 135. 3 Barn. & Ald. 47. The agents of government cannot in general claim extra fees from the public. 7 Price, 2.

(2) 3 Brod. & Bingh. 275. 3 Mer. 578.; and see 1 East, 135. and 1 East, 583.

(3) 1 Chitty on Pl. 74, 5. 12 Mod. 488. Sayer, 41. Roll. Ab. 94. pl. 5.

(4) 3 P.Wms 379. Roll. Ab. 95.

(5) 1 Chitty on Pl. 74. 12 Mod. 448. 1 Wils. 328. Sayer, 41. 2 Mod. 242. 6 Mod. 212. 6 East, 540.

(6) Roll. Ab. 90. 1 Bla. Com. 430.

(7) 8 E. 4. 45. 2 Mod. 67. 2 Lev. 172.

(8) 3 Wils. 451. 454. 5 Burr. 2721.; and see 1 Vent. 238.

(9) 6 T. R. 411. 1 Bos. & Pul. 404.

principal or the agent to *third* persons ; we will now examine into the situation in which the principal and his agent are placed, with respect to each other.

As a general rule, an agent who receives hire or reward for his service is bound to observe with care and diligence the interests of his principal, while, at the same time, he must adhere to his orders and instructions, and any deviation in this respect will render him responsible for the consequence ; and the mere intention of doing a benefit for his principal will furnish him no excuse for any injury that may arise to the principal from a deviation from his specific instructions (1) ; thus if goods be delivered to an agent to sell at a particular place, he cannot send them elsewhere (2) : and though this rule is not so strictly applicable to mere gratuitous agents, yet they are bound to exert the utmost of their ability and skill, to execute, beneficially, their undertaking ; and they will not, in general, be liable if they take the same care in the management of their principal's property as a reasonable attention to their own affairs would dictate to them to take of their own (3). But if a gratuitous agent pay the monies of his principal into his (the agent's) bankers' hands, generally, to his own account, he will be charged with loss arising from failure of his bankers (4). A gratuitous and voluntary agent who receives no commission or return for his trouble is never liable for a mere general nonfeasance. (5)

Liabilities of agent.

When an agent is not specifically restricted by his principal to any particular mode of acting, he is bound to consider the usual course of trade, and pursue the regular and accustomed modes of transacting the business in which he is employed (6) ; and by so doing he exonerates himself from liability from any

(1) Dyer, 161. 1 Hen. Bla. Lord Plymouth, 2 Atk. 480. 1 Malyne, 154. Beawes, Dick. 120. Routh v. Howell, 41. 43. 3 Ves. 566. Adams v. Claxton, 6 Ves. 229. Locke v. Hart, 11 Ves. 60. Wren v. Kirton, 11 Ves. 377.

(2) 4 Campb. 183.

(3) Massey v. Banner, 1 Jacob & W. 241. 1 Esp. Rep. 75. 2 Atk. 406. 2 Ld. Raym. 909. 1 Hen. Bla. 161. (5) 2 Ld. Raym. 909. Elsee v. Gatward, 5 T. R. 143. 1 Esp. Rep. 74.

(4) Massey v. Banner, 1 Jacob & W. 241. ; and see Knight v. (6) 2 Wils. 325.

loss that might have been avoided by acting otherwise (1); but if by so strictly following the usage of trade, he knowingly and advisedly works an injury to his principal, he will be liable, as if he sells goods upon credit to a person whom he knows at the time to be insolvent (2). An agent can never be bound to execute a commission which would be illegal or work an injury to third persons, and consequently he will not be liable for disobeying such commission, or for any injury that may arise to the principal therefrom (3). In general, if any benefit is acquired by an agent in the performance of his commission, it must be for the principal, even though the agent should exceed or deviate from his authority, and render himself liable; but the principal by taking such benefit discharges the agent from all liability (4). Where the master of a ship in a foreign port, from the state of the exchange, received a premium for a bill drawn upon England on account of the ship, it was held that this belonged to his owner, although there was a usage for masters of ships to appropriate such premiums to their own use. (5)

An agent, on account of the necessary confidence which must be placed in him, is in general precluded from acting as an adverse party to his principal; therefore, an attorney, after having once acted for his client in a particular transaction, cannot afterwards change and take up the management of the adverse party's claim or defence (6); and even the courts of common law will, on motion, restrain an attorney from so doing. And if a person does not chuse to act upon the confidence appearing in the course of a transaction to be reposed in him, he should reject it as soon as it is proposed (7). An agent cannot dispute the right of his principal. (8)

As an agent is bound to act only with a view to his principal's interest, and make the most advantage of every contract he

(1) 2 T. R. 188. Cowp. 480. Hen. Bla. 161. 2 Freem. Rep. 48. 4 Burr. 2061. 6 T. R. 12. Amb. Eq. C. A. 708.

(5) Diplock v. Blackburn, 3 219. Peake's Rep. 68. 1 Bro. Campb. 43. 1 Campb. 527. Pay- Ch. C. 452. 3 Ves. 566. 6 Ves. ley, 41. 1 Ves. 83.

(6) See *Ld. Cholmondeley's case*, 226. 266. 5 Ves. 331. 839. 19 Ves. 273. See *Payley, P. & A.* (7) 14 Ves. 294.

(8) 2 Barn. & Ald. 310.

enters into for his principal; if he is employed to sell, he cannot in general make himself the purchaser, nor if employed to purchase can he be himself the seller (1); and such bargains or acts of the agent are always viewed with great jealousy, and seldom enforced. In some cases, however, where the agent can shew that he has acted *bonâ fide* and fairly, and made the best advantage he could obtain for his principal, and acquainted him with all the knowledge he himself possessed; and where the principal knows of and assents to the agent's being in such cases the purchaser or seller, there such bargains and sales have been enforced on behalf of the agent (2). The subsequent express assent of the principal to such a bargain or transaction of the agent, however fraudulent, will be sufficient to entitle the agent to a performance of it (3). When an agent is sued, and claims no beneficial interest in the property or right in dispute, and his principal would finally be liable, he may in general, by resorting to a court of equity, and filing a bill of interpleader, compel the two real claimants to litigate the matter without involving him in the expence of resisting two suits (4).

We will endeavour to illustrate the foregoing rules, by pointing out in particular several of those duties which are necessarily attached to that class of agents which so frequently occur in all commercial dealings, viz. agents commissioned to sell and purchase, such as brokers, factors, auctioneers, &c. Any agent or factor who has general orders to dispose of goods for his principal to the best advantage, is bound to execute that degree of diligence which a prudent man usually exercises in his own affairs, and consequently he is authorized to dispose of the goods according to the best terms which can be obtained at the time; and if it shall appear that he has done so, and that

(1) See *Woodhouse v. Meredith*, 1 Jacob & W. Rep. 201. 5 Mad. Rep. 91. 8 Price, 127. *Downes v. Grazebrook*, 3 Mer. 209. 2 Bro. C. C. 326. *Lowther v. Lowther*, 2 Ves. 317. 1 Ves. 289. 13 Ves. 103. *Nellthorpe v. Pennyman*, 14 Ves. 517.; and see 31 Geo. 2. c. 4. s. 11. prohibiting salesmen, brokers, or factors, employed to buy or sell cattle in London, from buying or selling on their own account, (except for family use), under penalty of double the value.

(2) See *Woodhouse v. Meredith*, 1 Jacob & Walker's Rep. 204. 13 Ves. 103. 8 Ves. 502. *Payley*, 29. *Coles v. Trecothick*, 9 Ves. 234. 12 Ves. 355. 3 Bro. C. C. 119.

(3) *Woodhouse v. Meredith*, 1 Jacob & W. 204.

(4) *Stevenson v. Anderson*, 2 Ves. & B. 407.

he has sold the goods, even upon credit (1), to persons in reputed good circumstances at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal although some of these should fail (2). Where, however, the price is fixed, or orders have been given by the principal to sell for ready money only, from which he is not at liberty to depart, he will not be justified in selling for a less sum, or upon credit (3). So where the usage of business does not authorize the giving credit, it cannot be given without subjecting the agent to liability; and an auctioneer is liable for neglect of duty, if he sells and delivers over the goods of his principal otherwise than for ready money (4). And necessity will, perhaps, on some occasions, justify a factor in deviating from his qualified authority, as if he be limited to sell goods at a fixed price, and the goods be of a perishable nature, here, perhaps, when they are no longer in a condition to be kept, the factor, if he have no opportunity of consulting his principal, may sell them at a less price to prevent a total loss (5). The time of credit must in all cases be reasonable and customary (6), and the security such as the principal may avail himself of by reasonable diligence, and without extraordinary risk or trouble (7). The agent under a commission to sell or dispose of his principal's property, must conform in all things to his authority, and any unauthorized disposal or adventure of such property, not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent. (8)

If a factor, in the execution of a commission to purchase, deviates from his orders in price, quality, or kind, or if, after

(1) *Scott v. Surman*, Willes, 406, 7. 1 Campb. 258. 3 Bos. & Pul. 489. 2 Selw. N. P. 786. This seems to have been doubted (see cases cited in Paley, 22.), but is now it appears settled. A party selling goods of his own to an insolvent person for money, at the time of selling his principal's upon credit, is a strong circumstance from which to argue his knowledge of the vendee's insolvency, and is *prima facie*, though not alone sufficient, evidence to charge him in an action. Moll. 239.

(2) *Arg. Mackenzie v. Scott*, 6 Bro. P. C. 287. Beawes, 43.

(3) Cowp. 395. *supra* note (1).

(4) *Brown v. Staton*, 2 Chitty's Rep. 353.; and see 12 Mod. 514. Winch, 53. 1 Campb. 256. 5 Taunt. 749.

(5) 2 Mod. 100. Comyn on Contracts, 236. Sed vid. Willes, 406.

(6) Bulst. 103. Moll. 328.

(7) Bulst. 104. Yelv. 202. Winch. 53.

(8) *Lubbock v. Inglis*, 1 Stark. 104. ante. 4 Moore 36. Factor cannot barter, 3 B. & A. 616.

they are bought, he sends them to a different place from what he was directed, they must remain to his own account, except the merchant on advice admits them according to his first intention (1); and this admission of the merchant must necessarily depend on the circumstances of the case, for if he detains the property bought, or endeavours to derive some benefit from the purchase, he thereby adopts the agent's acts and binds himself (2). An agent must at every material step he takes in the execution of his commission, apprise his principal thereof; and if any unreasonable delay be evinced in this respect, he will be liable for any real injury occasioned thereby to the principal (3). An agent is always bound to be prepared to render a clear and faithful account of all his transactions relating to the commission, and must make such account with his principal whenever called upon, and he will be liable to make good any loss arising from a deficiency in this respect (4). Each of several joint agents may be compelled to render an account of the whole of their transactions, and a surviving partner must account for himself and his deceased partner. (5)

In the case of a stakeholder, who is an agent for both parties, as an auctioneer, he is bound to keep the deposit till the conditions are fulfilled upon which it is to be paid, and therefore payment over is no defence if such payments were premature (6).

(1) Payley, 25. Malyne, 82. Beawes, 43. 13 Vin. Ab. 6. 3 Taunt. 117. It seems that a merchant residing here or abroad, or at a very great distance from his factor, refusing the goods sent over by his factor, who exceeds his authority, may in most cases act therein as a factor for that person who broke his orders. Per *Ld. Hardw. Cornwall v. Wilson*, 1 Ves. 509. 7 Ves. 240. 2. Courts of equity will in some cases compel the principal to take up the purchase, though the agent has exceeded his authority; as if the excess of price given by the agent be for the purpose of effecting and does effect an equal saving upon the same goods in some other respect in which the factor was not limited, the principal will in equity be bound to take them. 1 Ves. 509.

(2) *Wilson v. Cornwall*, 1 Ves.

509.

(3) 13 Vin. Ab. 4. *Beawes*, 431.

(4) *Pearse v. Green*, 1 Jacob & Walker, 135. 14 Ves. 500. 8 Ves. 49. 14 Ves. 510. 8 Ves. 369. 13 Ves. 47. 53. 4 *Mad. Rep.* 373. Where accounts are very intricate and difficult, a bill in equity is in general the best method of proceeding to compel an account. *Eq. C. Ab.* 5. 7 Ves. 588. Otherwise an action at law. *Payley*, 46, 7, 8. 50.; and cases there cited.

(5) 3 *Wils.* 73. 2 *Leon.* 75, 6. *Cowp.* 814. 2 *H. B.* 235. *Eq. Ca. Ab.* 5.

(6) 5 *Burr.* 2639. 13 *East*, 432. 1 *Hen. Bla.* 218. 2 *Esp. Rep.* 640. 5 *Id.* 1. 5 *Taunt.* 815. 1 *Marsh.* 377. 6 *Taunt.* 258. But an auctioneer is not liable to pay interest on deposit, or expences of investigating title, &c. *Holt*, 569.; unless he has rendered

In general the principal cannot compel his agent to deliver over the proceeds of a contract till the latter has actually received them, and this is so far the rule, that it is reported to have been decided, that if an agent employed to sell, receives part only of the price, the principal cannot maintain an action for it till the transaction is closed, unless, indeed, it appear to be his fault that the rest of the price is not recovered (1); but directly the agent is in cash by any sale or contract he has made on behalf of his principal, he must account for sale, and take care of the produce and keep or dispose of it according to his principal's orders, and the mode of disposal of the property is at his own risk (2). The receipt of money by an agent may in many cases be presumed, as if the agent to whom goods have been consigned by his principal for sale, refuse, after a reasonable time has elapsed, to account for them (3). And where an agent wrongfully withholds or disposes of his principal's property, he subjects himself to an action; but in these cases, the act must always be wrongful and contrary to authority. (4)

In some cases the agent binds himself, by his contract or acts, to the payment over of money to his principal before he has received it. An agent acting under a *del credere* commission, in consideration of a certain per centage (5), guarantees his principal against any loss which may arise from non-payment by the persons to whom he himself sells the merchandise of that

himself personally liable on sale. Sugden, 36. Amb. 498. 10 Ves. 400. In general, if money be paid to a stakeholder for a particular purpose, unless he has paid it over to a party to the contract, he alone can be sued. 9 East. 378. Peake, 128.; see 1 Campb. 337.

(1) Varden v. Parker, 2 Esp. Rep. 710.

(2) Lucas v. Groning, 1 Stark. 392. Foster v. Clements, 1 Camp. * 4 Mad. Rep. 373. 5 Mad. Rep. 47. As to principal's right to have money or goods in hands of agent at time of his bankruptcy, see Payley, 66 to 74. Montague & Cullen. In case of agent's death, money received by him and not laid out again in any thing else, nor kept separate from his own funds, constitutes a debt due from his estate as to which the principal

is postponed to debtors of a higher class. 2 Vern. 638. Salk. 160. But if goods are sold by a factor upon credit, and the money has not been paid at the time of his death, but is recovered afterwards by his representatives, it does not become part of the assets, nor is liable to specialty debts, but must be accounted for to the principal, after deducting what may be due from him to the estate. 1 Ld. R. 340. 1 East, 366. Goods remaining in specie come under same rules as in case of the agent's bankruptcy. See Payley, 75.

(3) Hunter v. Welsh, 1 Stark. 224.

(4) 12 Mod. 602. 4 Esp. 157. 1 Ves. 424. 6 East, 540. 2 Bos. & Pul. 408. 1 Ves. 424.

(5) Payley, 76.

principal, and he renders himself liable in the first instance, and although he never is in the receipt of money; and on this ground such an agent may be sued for goods sold as if he had himself purchased the goods, and his liability is not affected by the statute against frauds. (1)

With respect to the amount of the claim the principal has upon the agent for the profits of the agency, he has in general a right to have every advantage and profit the agent has made, independently of the mere amount of the sum which would appear adequate to satisfy the agent for his customary or reasonable remuneration (2). And this rule is strictly adhered to; and as we have before seen, though the agent renders himself liable by an excess of authority, or commits any fraud on his principal, thereby obtaining any profit or benefit, the principal may notwithstanding claim it. (3)

As an agent is under an express or implied contract to perform his duty, an action at law may in general be supported against his executors for the breach of it; and where an agent has been guilty of fraud in selling at an under price, by collusion with the purchaser, the estate is liable in equity. (4)

These are the securities and protections afforded by the law to the principal against the misconduct or misfortune of his agent; on the other hand, the law has provided suitable securities and protections for assuring to the agent the due reward of his care and trouble. Factors and brokers, like other bailees, have a lien upon the goods bailed or committed to their custody; a right which we shall more particularly enquire into when we consider the liability of bailees, and the reciprocal rights by which those liabilities are attended. Factors and brokers have also a right to a commission upon the transactions they negotiate, unless there be a specific agreement to the contrary (5). The

Rights of agent
against his prin-
cipal.

(1) *Grove v. Dubois*, 1 T. R. 112. *Bize v. Dickenson*, 1 T. R. 285. *Bull. N. P.* 280. *Beawes*, 429. It is however usual to declare specially against him.

(2) 3 *Campb.* 43. *Brown v. Litton*, *Peere Wms.* 141. 8 *Ves.* 72. ante 216. The principal may expressly or impliedly waive this right to the benefit of his agent.

(3) *Ante*, 216. *Beawes*, 41. 2 *Wils.* 325. 1 *Hen. Bla.* 161. *Malyne*, 154. *Payl.* 42.

(4) *Lord Hardwicke v. Vernon*, 4 *Ves.* 411. *Bishop of Winchester v. Knight*, 1 *P. Wms.* 406. *Payl.* 75.

(5) *Holt*, 467. 8 T. R. 610. 8 *Bro. P. C.* oct. ed. 339.

amount of the commission must necessarily depend on the nature of the particular contract, or determined by the usage of trade or by the legislature (1). And agents are entitled, besides their commission, to be reimbursed all advances made in the regular course of a legal employment, such are the incidental charges for duties, warehouse room, &c. and all payments made for the necessary preservation of property committed to their care (2); and cases frequently occur in which they are justified in making advances without particular directions, and under exigencies not provided for by the regular rules of their business, and particularly where they act for the best, and where, from the circumstances of the case, the principal's authority to the disbursements might be reasonably inferred (3); but mere voluntary and officious payments of an agent not warranted, as being against principal's interest, or otherwise, or against express directions, cannot be recovered back by him (4). And an agent is not justified in embarking the property of his principal in any manner not authorized by the terms of his employment, however beneficial to the principal the prospect may be; thus if a factor lends his principal's money without instructions, though for his benefit, he has no claim to have it allowed in his account (5). And even in the execution of his appointed duty, if an agent conducts himself with such unskilfulness as to incur unnecessary expences,

(1) By 12 Ann. st. 2. c. 16. s. 2. the rate of brokerage to be taken by any broker or solicitor for procuring a loan is limited to 5s. for a hundred pounds, under £20 penalty. Broker is entitled to 5 per cent. on freight on chartering ship to Baltic. 4 Camp. 96. By 17 Geo. 3. c. 26. 10s. per cent. is allowed to a broker or solicitor for procuring a loan upon an annuity; but a solicitor advancing his own money is not entitled to commission. (*) By 31 Geo. 2. c. 10. s. 30. the commission of navy agents is fixed at 6d. in the pound. The agent's right to commission will be forfeited by any misconduct; 8 Ves.

371. 11 Ves. 355. 3 Camp. 451. 3 Taunt. 32.; so it is if he engages in any illegal or fraudulent transaction; 2 Wils. 133. Payley, 79. n. i.: so if an agent is made executor to his employer; 4 Ves. 596.: so if he hires himself to another when he has engaged to give up his whole time to his original employer; 1 Campb. 527. Agents employed by the crown cannot in general claim extra fees. 7 Price, 2.

(2) Payley, 79. and cases there cited. 1 Roll. Abr. 124. pl. 7.

(3) 1 Bro. 323.

(4) 1 Campb. 88. 8 T. R. 610. 1 T. R. 112.

(5) Beawes, 43. Payley, 83.

(*) 5 T. R. 597. An agent is indictable for taking too large a brokerage on negotiating an annuity. 6 T. R. 265.

he cannot obtain reimbursement (1); nor can any claim be made by an agent for advances in an illegal transaction (2). But if there be any subsequent acquiescence of the principal in any disbursement, or act of the agent, he will be chargeable therewith, though it were not warranted by his directions, or otherwise. (3)

It now remains to be enquired in what manner the power of an agent may be *determined* or *dissolved*. This may happen in several ways: 1st, By the completion of the office which the agent was constituted to perform; 2dly, By the principal's death; 3dly, By bankruptcy of the agent; and, 4thly, By the principal's countermanding the authority he had given. 1st, Then it is obvious to common reason, that an agent's power is *ipso facto* determined when he has completed the purpose for the execution of which that power was given (4): 2dly, The agent's power, though coupled with an interest, is *ipso facto* determined by the principal's death (5); the acts of a legal agent may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority which strangers could not examine; yet when once the death of the principal is known to those who dealt with his agent, they can no longer avail themselves of the acts which as agent he might subsequently perform: 3dly, The agent's power is determined by his bankruptcy (6), but this does not extend to his authority to perform a mere formal act, as a power to sign a deed or other instrument, which he may do with effect so as to bind the principal, notwithstanding his bankruptcy (7); but bankruptcy does not take away his personal rights (8). So an agent's authority is determined by his death, and his personal representatives can take no steps therein.

How the authority of an agent, factor, &c. may be determined.

Lastly, the agent's power is determined by the principal's countermanding the authority he had given, which it should seem

(1) *Capp v. Topham*, 6 East, 392.

(2) *Steers v. Rashley*, 6 T. R. 61. 4 Taunt 165. 13 Ves. 316.

(3) 5 Burr. 2727. *Beaves*, 43. Mal. 82. 1 Ves. 510. 4 Taunt. 165.

(4) *Blackburn v. Scholler*, 2 Campb. Rep. 343. Power of at-

torney authorising the sale of a vessel is revoked by death of owner. 1 Stark. 121.

(5) 6 East, 356. 2 East, 227. *Watson v. King*, 4 Campb. 272.

(6) 5 Esp. 158.

(7) 3 Mer. 322.

(8) *Hudson v. Granger*, 5 Barn. & Ald. 31.

may in general be done at any time before the contract has been completed, if the party contracted with has not been already put in a worse situation; though where the agent's power is coupled with an interest, it cannot be determined without his consent, unless by the principal's death or bankruptcy (1). The authority of a broker may be countermanded at any time before the memorandum of the contract of the sale is written and signed by him, pursuant to the statute of frauds, although he had previously entered into a verbal agreement to sell the goods (2). But where a broker is authorized by one man to sell goods, and by another to buy the same, an entry in his books of a sale of these goods from one to the other, signed by him, is a binding contract between the parties; the bought and sold note, which is a copy of this entry, is sent to the parties, not for their approval, but to inform them of the terms of the contract (3); and in general the principal may interfere and prevent any transaction taking place in his agency trust at any time before the transaction has taken place, but not afterwards (4). And where upon a dissolution of their partnership, two parties jointly appointed a third person to receive debts due to the firm for the use of both, it was held, that one of them might countermand the authority to the third person, and receive the money himself, and give a valid receipt (5). We have already considered the necessity of giving notice of the determination of an agent's authority to third persons. (6)

(1) *Watson v. King*, 4 Campb. 272. 5 Esp. 158. 2 Stark. 51.

(2) *Harmer v. Robinson*, in *Heyman v. Neale*, 2 Campb. 339. *Sugden, V. & P.* 5 ed. 88. 12 Ves. jun. 467. 13 Ves. jun. 25.

(3) *Heyman v. Neale*, 2 Campb. 339.

(4) *Lenneshire v. Alderton*, 2 Stra. 1182. 2 Stark. 50. 3 Esp. 253. In the case of a stakeholder who is an agent for both parties, receiving money to be paid over in

event of legal or illegal wager, though event of wager happen, yet if the money be not paid over, each party may recover from him his share. 7 Price, 540. 1 Bos. & Pull. 296. 4 Burr. 2069. 5 T. R. 405. 7 T. R. 537. 2 Esp. 629. 1 Selw. N.P. tit. Assumpsit, rules 7 and 8, and notes. 3 Taunt. 277. 4 ib. 474. But not if the money be paid over. 6 T. R. 575.

(5) *Burton v. Taylor*, 2 Stark. 50.

(6) Ante, 197, n.4.

CHAP. IV.

Of Partners. (1)

HAVING considered the various commercial contracts which may be entered into by individuals, without reference to the number of the contracting parties, it is now proposed to enquire into the modes by which trade may be carried on more extensively by the intervention of *partners*. It is not necessary on this occasion to attempt to detail the advantages which may result from uniting the capitals, the talents, and the labour of several persons, for the furtherance of any given object. It is obvious that many great undertakings could not be accomplished by the exertions of any one individual, or at least the greatness of the risk would deter one person alone from engaging in the undertaking (2); and where these objections might not prevail, still the union of several persons as partners in trade will frequently be productive of great advantage to each. One person who may be possessed of a capital, may, from want of early application to business, or other causes, be incompetent by himself to take an active part in commerce; another with great commercial talents may not have command of a capital; but by the conjunction of these two, the impediments which prevented each from separately engaging in trade are removed, and the capital of the one, and the talents of the other thus turned to the advantage of both, and consequently to the benefit of the community. The extensiveness of the branch of commerce in which these two are concerned, and the variety of departments which may require superintendence, may again frequently render the introduction of others into the partnership necessary. These are the chief advantages which arise from partnerships; it must however be allowed, that there are some disadvantages, such as the loss of a degree of independence in the mode of conducting business,

(1) As to partners in general, and the law relating to partnerships, see Watson's and Montague's Treatises on Partnerships; also Com. Dig. tit. Merchant, D. Chancery, 3 V. Bac. Abr. tit. Merchant, C. Vin. Abr. tit. Partners. 1 Comyn on Cont. 285. Selwyn, N. P. tit. Partners.

(2) Ante, 1 vol. 632.

and the liability for the contracts and frauds of partners, and which may deter many from entering into such an arrangement. Upon the whole, however, the advantages derived greatly counterbalance the objections, and the law considers them beneficial to the community. (1)

Nature of public and private partnerships, and general principles as to their formation.

Partnerships are by our law divided into public and private. The former are usually called companies or societies, and any one may, without the concurrence of all the others, become a member therein (2). Some are constituted either by letters patent, act of parliament, or by charter from the king, such as the East India Company, the Bank of England, &c. Others are not confirmed by public authority, but depend upon the agreement of the body of members, as are many of the fire and life insurance companies. The public companies incorporated by royal charter, or act of parliament, in this country, are not to be considered as partnerships, with any of the legal principles or consequences applicable to partnerships formed by the voluntary agreement of individuals; for in such public companies, where a trade is to be carried on under the corporate name in joint stock, as in the case of the East India Company, &c., there are express provisions that the members shall not be liable on account of the joint trade in their individual capacities, nor one of them for the debts or engagements contracted by others, but only for their respective shares or interest in the joint stock, and that merely in respect of the trade and contracts carried on or made in the corporate character. Therefore, if one or more persons enter into such a society, and become shareholders of the property and joint stock, yet such a joining together does not constitute partnership, according to the custom of merchants, nor within the principle of law established respecting joint traders (3). With respect to the public companies or societies which are not confirmed by public authority, they are the same as common partnerships, as far as respects the liability of the members to third

(1) See Watson's and Montague's Law of Partnership.

(2) As to companies, ante, 1 vol. 632. &c.

(3) A society for relief in sickness, &c. by means of a fund raised by subscription of the members, considered merely as a partner-

ship having no corporate character, 3 Ves. & B. 180.; and see 17 Ves. 1. 15. As to the manner in which these companies should be sued in equity, and the jurisdiction of that court to compel them to account, &c. see 16 Ves. 321. 17 Ves. 315. 6 Price, 405..

persons(1); but the articles of agreement between the parties are usually very different. The capital is generally divided into a certain number of shares, whereof each partner may hold one or more, with a restriction to a certain number. Any partner can transfer his share also under certain limitations; but no partner acts personally in the affairs of the company, the execution of their business being intrusted to officers, for whom the whole company are responsible, though the superintendancy of such officers is frequently committed to directors, chosen from the body at large(2). And in such companies the death of a member has no effect on the trading company.

A private partnership is not necessarily constituted by any legislative act, charter, or licence, the bare consent of the partners, fixed and certified by acts or contracts, being wholly sufficient; so that if two or more merchants or other persons join together in trade(3), or in any other transaction, or for the performance of any particular concern, with a mutual, though perhaps not an equal participation in the profit and loss, they are in every respect to be considered as partners(4); and this partnership may be limited to a particular concern, without extending to all the concerns in which another member is engaged.(5)

At common law there does not appear to have been any *limitation* as to the number of persons who might associate in any undertaking, whatever its nature might be, unless it would have been illegal if engaged in even by an individual. But in the early part of the reign of George the first, various designing persons having formed public undertakings, with a view to their own emolument, at the expence of unwary individuals, it was found necessary for the legislature to interfere; and the stat. 6 Geo. 1. c. 18. was passed, by which, after reciting the mischievous consequences of these projects, it is enacted, that such undertakings and attempts as are described in the act, and all other public undertakings and attempts tending to the common grievance of his

Number of individuals allowed in public partnerships.

(1) The King v. Dodd, 9 East, Rep. 37. Selwyn, N. P. 1087. 527. 14 East, 406. 15 East, 511. Com. on Cont. 285.

(2) Any subsequent alteration or removal of such officers in this respect must be with the assent of each individual member. 3 M. & S. 488.

(3) See 1 Montague, 3. 1 Bla. 11.

(4) There is no distinction between a banking concern or any other partnership. 1 Meri. Rep. 568.

(5) Cowp. 814. 2 Brod. & B.

majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions and other matters in furtherance of such objects, and more particularly acting as a corporate body raising transferable stock, shall be illegal and void; with a proviso, that the act shall not operate to prevent the carrying on partnerships as theretofore *legally* done. It was observed by Mr. Justice Blackstone (1), that this statute was enacted the year after the infamous South Sea project, which beggared half the nation; it appears however from Anderson's History of Commerce, that the South Sea bubble, as it was called, burst after the act was passed, and it rather seems that the passing of the act was attributable to the failure of Law's project in France (2). And it appears at first to have been considered that the inviting of subscriptions, by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, was necessarily an offence within the act (3); but it is now established, that in general these public undertakings, unless they fall within that class particularly enumerated in the statute, are not necessarily illegal, but that it requires the intervention of a jury to find, whether according to the provisions of the act, the public undertaking tends, in the words of that act, to the common grievance, prejudice, and inconvenience of his majesty's subjects, or great numbers of them (4). With respect to private partnerships, we have seen that there is no limitation as to the number of persons who may be concerned in them, or as to the nature of their undertaking: whenever an individual may be concerned in a transaction, several may equally concur; and the only restrictions which have been introduced by statutes are those which we have just considered, and which rather relate to avowed public companies, and which are of an injurious tendency to the community; also those restrictions which are enacted in favour of certain public companies, the establishment of which it has been supposed would be beneficial; of this nature are the prohibitions which we have already considered as to partners being concerned in insurances as underwriters on other persons property; of this nature also is the prohibition introduced by the stat. 6 Anne, c. 22. s. 9. and 15 Geo. 2. c. 13. s. 5. in favour of the Bank of England, by which it is enacted, "that no part-

Limitation of
numbers in pri-
vate partner-
ships.

(1) 4 vol. 116.

(2) 9 East, 518.

(3) 9 East, 516. 1 Campb. 547. 3 M. & S. 488.

(4) The King v. Webb and
others, 14 East, 406. 15 East, 511.

nership exceeding six persons shall borrow, owe, or take up any more money, on their bills or notes payable on demand, or at any less time than six months, during the continuance of the privilege of exclusive banking granted to the Bank of England (1).” Other legislative provisions of a similar nature, restrictive in particular undertakings of the number of partners, will frequently occur, as in some of the grants of patents.

Any person having a legal capacity to contract, may become a partner; and though an infant cannot trade so as to subject himself to be sued or become bankrupt, yet he may contract for his own benefit, and become a partner, so as to be made a co-plaintiff (2), though he cannot be made a co-defendant (3). Where an infant held himself out as in partnership, it was decided that it was his duty on his attaining twenty-one to notify his disaffirmance of the partnership; and not having done so, he was holden liable as a partner (4). Trustees or executors carrying on trade, though for the benefit of infants, and without any beneficial interest, are personally liable as partners to third persons. (5)

Who may become a partner.

We will now consider how a private partnership may be constituted; *first*, as between the parties themselves, and *secondly*, as to third persons or the public. (6)

As to what will constitute a private partnership.

As between the parties themselves, it is necessary that there should be an agreement between them, either express or implied,

What constitutes a partnership between the parties themselves.

(1) This does not extend to the East India Company, 33 Geo. 3. c. 52. s. 108, 9, 10.; neither does it preclude the members of a commercial firm, though exceeding six in number, from drawing bills at a shorter date than six months. *Wigan v. Fowler*, 1 Stark. Rep. 459. A corporation not established for trading purposes cannot be acceptors of a bill payable at a less period than six months from the date, because it falls within the provisions of the several acts passed for the protection of the Bank of England, and it has been questioned whether any except a trading corporation can bind themselves as parties to a bill of exchange, unless authorized by a particular act of parliament.

Broughton v. Manchester and Salford Waterworks, 3 Barn. & Ald. 1.; and see 5 Barn. & Ald. 210. 5 Taunt. 792.

(2) *Glossopp v. Coleman*, 1 Stark. 25. *Goode v. Harrison*, 5 Barn. & Ald. 147. 1 Moore, 466. 2 M. & S. 205. 6 Taunt. 118. A court of equity will when necessary appoint a person to carry on a trade for the benefit of an infant partner, but not for a lunatic. 1 Montague on Part. 187.; and see ante, as to who may enter into contracts.

(3) 4 Taunton, 468.

(4) 5 Barn. & Ald. 147.

(5) 1 Maule & S. 412.

(6) As to this distinction, 17 Ves. 403. 2 Campb. 46.

that each shall reciprocally participate in the loss as well as the profit in the concern, and the mere sharing one of these without the other will not constitute a partnership (1). Therefore a loan of money by A. to B., to carry on any concern or transaction in which A. is to derive a profit from the trade, as well as £5 *per cent.* interest, while at the same time he is to be indemnified by B. from any loss, is not a partnership *inter se*, but merely an usurious stipulation (2). So where a person is to have a proportion of profits, as or in lieu of wages or remuneration, but without liability for losses, he is not a partner as between him and his employer (3). And if A. agrees to supply B. with a manuscript work, to be printed by B. at his sole expence, and the profits to be equally divided, B. may sue A. for not supplying manuscript (4). The equality of the terms on which a partnership arrangement has been entered into is not material; and therefore where A. borrowed of B. £100, to be repaid without interest in four years, and agreed to receive the daughter of B. as his wife's partner, to bear half the losses and share the profits, and to board such daughter for four years, and to board B. for £10 a year, and repay the £100 with interest in case of the death of said daughter; though it was pleaded that the contract was usurious, the court held it a partnership, and legal. (5)

No particular form of words or proceeding is necessary to constitute a partnership; it may be entered into either by an express and formal agreement in writing between the parties or by a parol one, though indeed, it is in most cases advisable for parties to pursue the former method at the time when the partnership is formed, as a greater security and advantage to each, the rights and liabilities of the parties being more fixed and certain as amongst each other (6). It seems that an agreement by which parties may have engaged at a future time to enter into a partner-

(1). 17 Ves. 404. 4 T. R. 353.

(2). *Moore v. Wilson*, 4 T. R. 353.; but see 2 Burr. 891.

(3). 4 East, 144. 4 M. & S. 244. 4 Esp. Rep. 182. 5 Taunt. 74. 17 Ves. jun. 404. 1 Campb. 329. 2 Campb. 46. 1 Montag 7.

(4). 2 Stark. 107.

(5). 2 Burr. 891.

(6). This agreement should state the parties to the contract, the business to be carried on,

the space of time the partnership is to continue, the capital each is to bring into the trade, the proportion in which the profit and loss are to be divided, the manner in which the business is to be conducted, the mode agreed upon for settling accounts at the dissolution of partnership, together with the special covenants adapted to the circumstances of each particular case. *Watson*, 64.

ship will, under circumstances, be carried into effect by a court of equity decreeing a specific performance of it, though in truth it is a mere chattel interest (1). If, however, by the terms of the agreement, the partnership, if actually entered into, would have no fixed duration or benefit, as if it be stipulated that either party might put an end to it upon giving a reasonable notice, there the court would not interfere in this respect (2), and the party will be left to his remedy at law to recover damages for the nonperformance of the agreement. (3)

As to what will constitute a partnership with respect to third persons, the question is not as between the parties themselves, whether there must be a participation of profit as well as loss, but simply whether there be an agreement express or implied for a participation of profits, or whether a person has so conducted himself as to induce the world to suppose he is a partner, the world never being bound to look into the actual agreements and stipulations between the partners themselves (4). Under this head we will consider: 1st, What will constitute a partnership as to the world, by a participation of the profits of the partnership: 2d, What will constitute a partnership without any actual participation of such profits.

What constitutes a partnership as to third persons.

It is a well established principle of law, that a joint participation in the profits of a trade or concern without a participation in the losses constitutes a partnership, so as to make the parties participating in such profits liable as partners to third persons (5); and this although a party has no interest in the capital, or no apparent one in the participation of the profits, and though the division of the profits be ever so unequal; for by taking a part of the profits, he subtracts from the creditors a part of that fund which

What constitutes a partnership as to third persons by a participation of profits.

(1) *Beaton v. Liston*, 3 Atk. 385. 2 Ves. sen. 629. 16 Ves. 49.

(2) *Hercy v. Birch*, 9 Ves. jun. 357.

(3) *Morrow v. Saunders*, 1 Brod. & Bingh. 318. 1 Marsh. 610. 2 Stark. 108. A partnership as to third persons will be prima facie evidence that there is a partnership between the parties themselves. *Peacock v. Peacock*, 2 Campb. 45.

(4) As to what constitutes a

partnership in general, see 1 Hen. Bla. 37. 2 Hen. Bla. 246. 4 T. R. 720. 4 East, 144. 16 East, 174. *Hoare v. Dawes*, Dougl. 373.

(5) *Waugh v. Carver*, 2 Hen. Black. 235. *Ex parte Langdale*, 18 Ves. 301. *Cheap v. Cramond*, 4 Barn. & Ald. 663. *Malkin v. Vickerstaff*, 3 Barn. & Ald. 897. 2 Sir W. Black. Rep. 998. *Dougl. 371.* and cases cited in 1 Montague, 4.

is the proper security to them for the payment of their debts (1); but the parties must have a joint specific interest in the profits themselves as profits. An agreement therefore to pay so much out of the profits of the concern for the labour of a party, or to pay an outgoing partner an annuity for his interest in the profits and good will of the partnership, does not constitute a liability as partner to third persons (2). There must also exist a partnership at the time of the contract with a third party, to constitute a liability of partners to third persons, and a subsequent joint interest does not constitute a joint liability upon a contract made with one of several persons who has not a joint interest at the time of the contract (3). Besides which, it is necessary that the shares should be joint, and there should be a communion of interest in the profits of the concern; and therefore a purchase by one person, upon an agreement between him and other persons that each shall have a distinct share of the whole, without any communion of profit, does not constitute a liability as partners to third persons (4). But a liability under this degree of partnership as to third persons, may be considered as discharged, where a party waives his right to consider it as a partnership by entering into a contract with, and actually giving credit to any individual member or members thereof only; as if several persons dine together at a tavern, they are, *prima facie*, jointly liable for the whole bill, and not merely each for his own share; but if the credit be given to one only, he alone is liable. (5)

2. What constitutes a partnership as to third persons, by being an apparent partner.

If a party, by his own act or inadvertence, allows himself to appear to the world as a partner, he is precluded from disputing the fact, though he has no interest in the profits (6); and as to

- (1) 2 Hen. Bla. 246. 19 Ves. 291. 371. 1 Hen. Bla. 37. 2 Hen. 457. 17 Ves. 203. 18 Ves. 157. Bla. 235. Holt, C. N. P. 227.
Cooper v. Eyre, 1 Hen. Bla. 57. (5) 3 Bar. & Ald. 89. 3 Campb.
Rex v. Dodd, 9 East, 516. Holt. 51. 3. 168. 2 Taunt. 49. De-
C. N. P. 227. 1 Stark, 272. 298. launny v. Strickland, 2 Stark. 416,
(2) *Ex parte Hamper*, 17 Ves. 457. 1 Stark. 338. 272.; see 2
404. 19 Ves. 461. 1 Mont. 7. Campb. 99. 640. *Emly v. Lye*,
1 Camp. 329. 2 Sir W. Black. 15 East, 7. *Denton v. Rodie*, 3
Rep. 998. *Waugh v. Carver*, 2 Campb. 493.
Hen. Bla. 235. 590. *Barnard*.
343. *Peake*, 74.
(3) *Young v. Hunter*, 4 Taunt.
582. *Saville v. Robertson*, 4 T. R.
724. 12 East, 424. 13 East, 7.
2 Campb. 97. and 2 Taunt. 49.
(4) *Hoare v. Dawes*, 1 Dougl.
(6) 1 Dougl. 371. *Young v.*
Axtell, cited in *Waugh v. Carver*, 2
Hen. Bla. 246. *Newsome v. Coles*,
2 Campb. 617. 16 East, 174.
18 Ves. 300. 19 Ves. 459. 2
Taunt. 51.

what amounts to such an apparent partnership must depend on the circumstances of each case (1). And a member of a firm who retires will be liable on account of the remaining members continuing his name in the firm, even without his consent, unless he take the necessary precaution, as advertisements, notices, &c. to the world, that he has discontinued being such member (2); and this liability attaches, notwithstanding the ignorance of the creditor that the name of this nominal partner was used in the firm (3); but if the creditor knows that a party is but a mere nominal partner, and has no interest in the profits to make him an actual partner in the eye of the world, the latter will not be liable to such creditor as a partner (4), unless there was an understanding that though he had ceased to receive profit, yet his name was to continue in the firm for their benefit (5). And if a party expressly contracts or represents himself as partner in a concern, as by drawing a bill of exchange in the name of two persons, he will be liable as a partner (6); or if parties separately interested in aliquot parts of a ship, employ a joint agent, they are liable in the aggregate (7), and provided there exists a partnership, it is of no importance or consequence to third persons as to the manner in which it is formed, or what are the private agreements between the partners. (8)

Form of partnership as to third persons.

As to the *interest* of each of the partners in the partnership property, it may be considered; 1st, With respect to property which they respectively contribute at the outset of their dealings; and, 2d, What is acquired in the course of the partnership.

Rights and liabilities of partners *inter se*.

Partners have a unity though not an entirety of interest, in all the stock in trade of the partnership; and their title being undivided, they have the same species of interest therein, whether each individual member contributes exactly in the same propor-

Interests of partners in *personal* property contributed at outset of partnership.

(1) 2 Stark. 453. 478. 488. Action sur Case, 24, 25. 3 Campb. 1 Stark. 407. 446. 499. 2 Moore, 51. note. 2 Campb. 302. 153. 1 Brod. & B. 9. (5) 2 Chitty's Rep.

(2) Newsome v. Coles, 2 Camp. 617. As to necessary precautions to be taken on dissolution of partnership, see post. (6) Carvich v. Vickery, Dougl. 653. 16 East, 174. 1 Maule & S. 249. 2 Moore, 153. 2 Campb. 640.

(3) 2 Hen. Bla. 242.

(4) Alderson v. Pope, 1 Campb. 404. n. a. Watson on P. 26. (7) Pasmore v. Bousefield, 1 Stark. 296.

Montague, 17, 18. Roll. Abr. (8) 1 Stark. 272. 2 Taunt. 49.

tion or not, but their several *degrees* of interest must be regulated according to the stipulated proportions, and the different conditions of and agreements under which the partnership is formed (1). Where, indeed, a partnership is entered into without any agreement or stipulation as to the division of interest in the concern, courts of law, as well as equity, will consider, under the circumstances of each particular case, what will be fair and reasonable for each partner to receive, though *prima facie* each partner would be entitled to an equal share (2). Whether the partnership be general or only for a particular concern, after an agreement executed between the parties, the stock and effects which are put into partnership become common to all the partners, from the time of entering into the partnership, although they are not delivered, but remain in the possession of that partner who was the sole owner of them before the partnership was contracted; for, by construction of law, the intention of the parties to communicate the goods according to the agreement executed, vests the interest, and each of the partners possesses for all the others that which belongs to them in common, which is in his custody, each of them being possessed *per my, et per tout*. (3)

Interests of partners in personal property acquired during partnership.

This unity of interest extends not only to such particular stock as may be brought into the partnership at the time of its formation, but to all such as may at any time arise in the copartnership dealings from the time of its formation (4); but the quantum allowed to each partner of this acquired property must be governed in the same manner as in the above mentioned method in the case of stock contributed at the outset of the partnership (5); however, to whatever share of these profits or stock a partner may be entitled to, or in whatever sum the firm may be indebted to him, he has *no exclusive right* to enjoy or receive it until a balance of accounts be struck between him and his fellow partners (6), but he has a lien upon the partnership

(1) Watson, 66. 2 Bla. Com. 188.

(2) Peacock v. Peacock, 2 Campb. 45. 16 Ves. 49. S. C.

(3) Watson, 66. Domat. ed. 1772. tit. 8. §. 3.

(4) Equity, as we have seen, will in some instances decree a specific performance of an agreement to let a party into a trade,

ante 230; but the profits do not accrue to such party, as partner, till he is actually let in. Anon. 2 Ves. 629. Watson, 413. He must proceed at law for damages; but see 16 Ves. 49.

(5) Supra, Watson, 111.

(6) 1 Ves. 242. Cowp. 419. 471. Watson, 66. 2 Campb. 45. 11 Ves. 49.

estate for any sums of money advanced by him to, or owing to him from, the partnership (1). A partner, upon the receipt of any property, should apply it either to the partnership purposes, or charge himself as debtor with it in the partnership books (2). There is no difference in the interest of partners in goods to be disposed of in the course of trade, and in a chattel, the keeping and employment of which constitute the object of the partnership.

When real property is held or purchased for the purpose of a partnership concern, the partners are, to all beneficial intents, tenants in common thereof, without regard to the form of the conveyance, the individual to whom it is made, or the length of time for which the interest is to endure (3): courts of law, it is true, must look to the legal estate; they will consider the survivor of two joint tenants as invariably entitled to the whole by survivorship; and if lands are conveyed to one of several partners, they will invest him with all the right of a tenant in severalty, excluding from their attention the fund from which such lands were bought, and the object of the purchase; but courts of equity, unfettered by technical rules, seek to effectuate the intention of the parties, and are guided by the justice of each particular case, they therefore conceive that there is a tenancy in common between partners of real property, and they decree the person in whom the legal estate is vested, to be a trustee for those beneficially interested (4); but though the general rule is that estates purchased out of the partnership fund shall belong to all the partners as tenants in common, even if conveyed to one only, yet it will be otherwise, if there be an *express agreement* that the estates shall be the partner's to whom they are conveyed, and that he shall be a debtor to the partnership for the money (5). It seems formerly to have been held, that lands purchased for the purpose of a partnership concern, were in all respects a portion of the partnership fund, and were therefore distributable as personal property. It is now settled, however, that though a copartnership agreement may alter the nature of

Interest of partners as to real property.

(1) Watson, 139.

(2) 3 Ves. & B. 36.

(3) See Watson, 72. post, as to survivorship and interests of partners.

(4) Lake v. Craddock, 3 P.Wms. 158. 1 Ins. 182, 1 Vern. 217.

2 Lev. 188. 228. 1 Ves. 433.

Foster v. Hale, 3 Ves. 696. 5 Ves.

308. 7 Ves. 453. 3 Bro. 199.

9 Ves. 500. 1 Stark. 181.

(5) Smith v. Smith, Watson, 77.

real property, it must be express so to do, and that upon the death of partners, the houses and lands they held and used in their trade shall descend according to the rules of common law. (1)

Rights of partners in the management of partnership property.

We shall at present pass over our inquiries relative to what power each partner has over the partnership property, as they will be found more adapted to that part wherein we shall consider the liability of partners as to third persons; suffice it to say, that the power in managing the partnership property must in some measure depend upon the articles of partnership, by which particular authority may be vested in one or more partners by the rest; or, if there has been no express stipulation between them, a majority must decide as to the disposal of such property; or if no majority can be obtained to decide as to such disposal, or there are but two partners in the firm, one or more partners may manage the concern as they may think fit, provided it be within the rules of good faith, and warranted by the circumstances of the case. The general duty of a partner is to observe at all times, and in all transactions, the interest and welfare of the partnership, by acting honestly and uprightly, and as a prudent man would conduct his own affairs. These rights and liabilities of partners may be put an end to by dissolution of the partnership; the right to determine which, and the manner in which a partnership may be dissolved, we shall consider hereafter.

Rights of partners as to third persons.

We will now consider the important rules affecting the rights and liabilities of partners, as between them and *third* persons. It is a general rule that all contracts, promises, undertakings, transactions, demands, &c. made with, to, or by one of several partners in the course of the joint trade, are construed by law to be made to and for all of them, and all are entitled to take advantage of them, and whether they be express or implied, the legal consequence will be the same (2); and therefore the joint owners of a vessel engaged in a whale fishery may sue a purchaser for the price of whale oil, although the contract of sale were made by one of the part owners, and the purchaser did not know that other persons had any interest in the transaction (3). In cases of doubt, the criterion to determine the

(1) 3 Brown, Ch. Rep. 199.
1 Ves. 434. 5 Ves. 180. 9 Ves.
500. See also 1 Stark. 181.

(2) Watson, 111. 3 Price, 544.
4 Barn. & Ald. 437. 1 Chitty on
Pl. 5, 6.

(3) 4 Barn. & Ald. 437.

nature of such contracts, &c. must be the description of the consideration or transaction; if the consideration or transaction proceeds from or relates to the partnership, it will be construed accordingly, and *vice versa* (1). A release to one partner is a release to all, although they are jointly and severally bound (2), but this does not extend to dormant partners, for a party has always a right against a concealed partner, of whom he has had no previous knowledge, as soon as he discovers him, unless indeed that ignorance were his own fault, as by not having used due diligence to find him (3). It must be here observed as a general rule, that if a partner so far exceeds his duty or authority as to discharge the partnership from liability, yet he himself is personally and individually liable for all the obligations and acts he enters into or commits, though he professed to act in the character of a partner. (4)

It may be laid down as a general rule, that partners, whether actual, ostensible, or dormant, are bound by the act of their copartner, made in the course of and with reference to the partnership business, and in the regular course of dealing by the firm; and though the general rule of law is, that no one is liable upon any contract, except such as are privy to it, yet this is not contravened by the liability of partners, as they may be imagined virtually present at, and sanctioning the proceedings they singly enter into in the course of trade, or as each vested with a power enabling them to act at once as principals, and as the authorized agent of their copartners (6). It is for the advantage of partners themselves, that they are thus held liable, as the credit of their firm in the mercantile world is thereby greatly enhanced, and facility is given to all their dealings, so that they may reside in different parts of the country, or in different quarters of the

Liability of partners as to third persons. (5)

(1) See Watson, 111. 3 Price, 544. 1 M. & S. 249.

(2) Co. Lit. 232 a. Bac. Abr. tit. Release, G. 2 Moore, 9.; as to what amounts to a release, see 6 T. R. 525. 5 East, 147. 1 P. Wms. 237.; a covenant not to sue one does not, 8 T. R. 169.; agreeing to consider one as liable does not. 2 Barn. & Ald. 210.

(3) 3 Price's Rep. 544.

(4) 2 Mod. 228. 2 T. R. 32. 2 Esp. Rep. 269.

(5) See Watson, 167.

(6) See Watson, 166. 1 Salk. 291. 1 Montague on Part. 20. 12 Mod. 446. 11 Mod. 40. 2 Cowp. 814. 1 East, 48. Godb. 244. 7 East, 211. 10 East, 418. 2 Barn. & Ald. 678. 1 Campb. 185. 279. 2 Stark. 348. Chitty on Bills, 6 ed. 29, and cases there cited.

globe. A due regard to the interest of strangers is at the same time observed; for where a merchant deals with one of several partners, he relies upon the credit of the whole partnership, and therefore ought to have his remedy against all the individuals who compose it.

A partner therefore is bound by the purchase (1), admissions (2), representations (3), notice (4), payment (5), receipt (6), delivery, or indeed any other act or transaction made by, to, or with his partner, relating to and on account of the partnership trade; as by selling the effects (7), borrowing money (8), pledging the credit or property (9), releasing the debts (10), by being a party to a simple contract (11), bill of exchange, or other negotiable instrument, or security not under seal (12), however disadvantageous any of these acts may be to him; and this liability also cannot be shifted or affected by any previous, existing, or subsequent arrangement between the partners themselves, as to the manner in which the trade shall be conducted, or the proportions or mode in or by which the debts should be paid, unless indeed by notice of such arrangement. (13)

We have now to consider for what particular acts, and under what particular circumstances, one partner will be bound by the

- (1) 1 Campb. 185.
- (2) 1 Stark. 81. 161. Dougl. 651. 1 Maule & Selw. 249. 1 Taunt. 104. 7 Price, 198.; sed vid. 1 Stark. 61.
- (3) 2 Barn. & Ald. 795.
- (4) 1 Maule & S. 259. 1 Camp. 404. n. 5 Maule & S. 47. 1 Stark. 181.
- (5) 15 Ves. 213. 2 Brod. & Bing. 465.; but not if made on sole personal account. 3 Barn. & Ald. 89.
- (6) 2 Campb. 561. 3 Barn. & Ald. 89.
- (7) Godb. 244. 7 East, 211.
- (8) 1 Esp. 406.
- (9) Peake, 79. 1 East, 48. 15 Ves. 286. 2 Barn. & Ald. 673. 3 Campb. 478.; but it must be as relating to the partnership, and in the usual course of their dealings. 3 Campb. 478. 1 Gow. 132. 1 East, 48. 13 East, 175. 5 Barn.

& Ald. 402. and post; and one partner cannot pledge partnership property for his own debt. 4 Taunt. 684.

(10) 2 Co. 68. 7 East, 211. A release, however, of a partnership debt, if procured by fraud, will be invalid. 4 Moore, 192.

(11) 1 Stark. 402. 4 Campb. 66. 207. 2 Barn. & Ald. 673. 795.

(12) Styles, 370. Holt, 434. Cowp. 814. 11 Mod. 401. Salk. 126. Ld. Raym. 175. 7 T. R. 207. 4 T. R. 313. 2 Esp. 731. 7 East, 210. 13 East, 175. 1 Campb. 403. 8 Ves. 542. 15 Ves. 286. Holt, C. N. P. 143.

(13) Smith v. Jameson, 5 T. R. 601. 1 Stark. 272. 2 Campb. 302.; neither will this liability be discharged by three partners taking security from one partner. 2 Stark. 178. 2 Barn. & Ald. 210. 3 Barn. & Ald. 611.

act of another partner, in which he does not expressly concur; we have seen that a partner is liable for all acts *bonâ fide* done in the course of, and with reference to the joint trade; he is also liable for the fraud of his partner, if the partner act professedly on the joint account, though in truth for his private emolument, and a third party had no notice of such fraud; for one partner cannot excuse himself, by saying that the other has entered into engagements of which he was totally ignorant, or has conducted himself fraudulently or dishonestly (1). If, however, a party at the time of a partner's entering into a bargain or transaction with him, in fraud of or against the consent of the rest, knew of such fraud or want of consent, he cannot avail himself of such bargain or transaction as binding on the firm (2); and evidence may be adduced so as to afford presumptive proof of such knowledge (3); and a partner entering into a bargain or contract as an individual may be sued as such, though there are dormant partners (4). Unless however the act of one partner relates to and is connected with the partnership trade, and in the course of dealing by the firm such acting partner only will be bound; for it is only by *acting in the course* of their particular trade or line of business, that an implied authority is delegated by partners to each other; and it is only in such transactions that third persons have a right to rely upon the credit of the partnership funds (5); and to bind the partnership credit must be given to the firm itself, and not separately to the individual partner who acts; and although one of several partners may, in furtherance of the joint concern, enter into a contract, yet if it were entered into exclusively and solely upon the credit of such partner, it will not be obligatory upon the firm, and will only bind the particular partner who entered into the contract (6). But though this separate credit may be given to one of several partners, yet

(1) Watson, 175. Cowp. 814. Bond v. Gibson, 1 Campb. 185. 2 Campb. 561. 2 Esp. 524. 731. 1 East, 48. 7 East, 210. Ridley v. Taylor, 13 East, 175. 2 Stark. 287. 347. 4 Maule & S. 475. 8 Ves. 542. 15 Ves. 286.

(2) Id. *ibid.* 1 East, 51.

(3) Id. *ibid.*; and see in particular, 8 Ves. 544. 1 East, 53. 1 Mont. 622. 2 Stark. 347. 2 Campb. 561. 13 East, 175.

(4) Post, 19 Ves. 294.

(5) Watson, 188. Vin. Abr. v. 16. p. 242. 2 Barn. & Ald. 678. Duncan v. Lowndes, 3 Campb. 676. 2 Stark. 348. If a party make a joint order for goods as against him, it will always be considered as on partnership account. 2 Moore, 153.

(6) 3 Barn. & Ald. 89. Ante, 232. Barton v. Hanson, 2 Taunt. 49. 2 Campb. 97. 1 Stark. 274.

in general the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence (1). Debts contracted by one partner, before the commencement of the partnership, cannot constitute a joint demand upon the firm, though, if there were an express agreement to become responsible for these debts, a joint liability would attach (2). Where the partner has received the benefit of the previous contract, courts of equity will frequently bind the partners (3). So if a partnership is in existence at the time of one partner acting, but who deviated so far from his duty as to discharge the partnership, yet if the partnership, by a subsequent approbation, adopt the original act of their partner, a previous authority will be inferred, and they will be liable thereon (4); but strong circumstances of subsequent approbation must be brought forward to create this liability (5), for so essentially is it necessary that a person sought to be charged should have been a partner at the time when the contract sued upon was entered into, that if it clearly appear that no constructive and retrospective partnership existed at the time of the contract, no subsequent acknowledgment by him will render him liable (6). One partner cannot, as such, except in bankruptcy, bind another by deed, and this both for technical reasons, and on the general policy of the law (7); however a deed executed by one, in the presence and by the authority of the other partner, binds both (8); but though he cannot by deed bring any fresh burden upon his copartner, he may bar him of a right which they possess jointly, as by release. (9)

Effect of disclaimer.

The authority of a partner however is revocable, and it is now fully established, that a disclaimer of the authority

2 Bos. & Pul. 120. 5 Esp. 122.
1 Stark. 164. 338. 2 Stark. 347.
2 Barn. & Ald. 673. If a party
treat as an individual, he cannot
afterwards say he has a partner,
2 Campb. 99. 7 T. R. 361. 2
Esp. 469. 15 East, 7.

(1) Id. ibid. 1 Campb. 185.

(2) Watson, 180. 6 Ves. 602.
Sheriff v. Wilks, 1 East, 48.
Swann v. Steele, 7 East, 210. 1
Mont. Bkpt. L. 620, 1.

(3) 8 Ves. 540.

(4) 1 Stark. 264. 2 Barn. &
Ald. 673. 1 Gow. 1. 1 Dowling

& R. 32. 4 T. R. 720. Watson,
202. 1 Mont. 622.

(5) Id. ibid. Exparte Bonbonus,
8 Ves. 540.

(6) Id. ibid. Watson, 183.
4 T. R. 720.

(7) Ball v. Dunsterville, 4 T. R.
313. Harrison v. Jackson, 7 T. R.
207. Holt, C. N. P. 143. Wat-
son, 219. 2 Bos. & Pul. 338.
268, 270. 10 East, 418. 2 T. R.
32. 2 Stark. 452.

(8) 4 T. R. 313. Sir W. Jones,
268. 7 T. R. 207. 2 Stark. 452.

(9) 2 Co. 68. 7 East, 211.

of the partner in any particular transaction will preclude him from binding his copartners, and it seems that even during the subsistence of the partnership, and in the established course of trade, one partner may, to a certain degree, limit his responsibility; and if there be any particular speculation or bargain proposed, which he disapproves of, by giving distinct notice to those with whom his copartners are about to contract, that he will not in any manner be concerned in it, they could not have recourse against him, as proof of this notice would rebut his *prima facie* liability; the partnership in that case might be considered as dissolved, or *quo ad hoc* as suspended. (1)

In general, whenever partners are liable at all, they are liable as for any personal debt they may have individually contracted; the partnership creditor, after obtaining judgment against them, may seize the whole of their goods, may get possession of one-half their real estates, or may take out execution against their persons, or he may levy the separate property of either of them; for though we have seen, that the partnership rights and liabilities may be limited in very disproportionate shares between each other, yet this is not so with regard to third persons, who may enforce their claim and remedy against any one in particular; for in our courts the rule of law is established, that if a partner shares in the advantages, he must also share in all the disadvantages of the partnership concerns; and that a partner who has a very small share in the concern is liable for the whole of the debts contracted by the firm, and must seek his remedy for a rateable contribution against his partners. (2)

Extent of liability.

With respect to the liability of partners for *torts*, the general rule is that they are not liable for the wrongs of each other, unconnected with contracts; if they all join in one trespass, or tort, they may all be sued and compelled to make compensation for such injury, but this action arises from their personal misconduct, and not from the relation of partnership which subsists between them: with regard to matters quite unconnected with

Torts.

(1) Watson, 194. 1 Salk. 291. (2) Watson, 234. 2 T. R. 100. Minnit v. Whitney, Vin. Abr. tit. 2 Bos. & Pul. 268, 270. In France Partners, A. Lord Galway v. Mathew, 10 East, 264. 7 Price, 193. the liability of a partner may be restricted on terms publicly registered. 1 Stark. 164. 5 Bro. P. C. 489. oct. ed.

the partnership trade or business, there can be no question, and in general, the wilful misconduct of a partner unconnected with any contract, will only implicate those who are guilty of the tort. Thus, if one of two bankers in partnership should commit usury in discounting, or if one of two attorneys in partnership should practise without a certificate, the innocent co-partner would not be liable to an action for penalties. But in general a partner is liable for the negligence of his co-partner, in performance of a contract connected with their joint trade (1); and partners, like individuals, are responsible for the negligence of their servants in the course of their business, and for infractions of revenue law committed by one of them; and if one of the partners acts, he is considered, in this instance, as the servant of the rest. In these cases the tort is looked upon as the joint and several tort of all the partners, so that they may either be proceeded against in a body, or one may be singled out and sued alone for the whole of the damage done; this happens not unusually in actions for driving against carriages, running down ships, &c. With respect to smuggling, it may be collected that if one partner be guilty of it on the partnership account, the other partners are liable to the duties and the penalty; but the crown may proceed against the real delinquent alone, or against all the partners jointly (2). So a bookseller or newspaper proprietor is answerable for the acts of his agent or copartner, not only civilly but criminally (3); to charge him with the publication of a libel in an action for damages, or by way of information or indictment, it is enough to prove that the libel was sold at his shop, or appeared in his journal; and it would be no defence for him to say that he gave no direction whatsoever for the publication of the libel, and was an utter stranger to it. But the necessity of the case fully justifies this seeming rigour. Knowledge could in few instances be directly brought home to the defendant, and it must have a salutary effect to make printers, publishers, and the editors of periodical papers responsible for those whom they associate with, and whom they employ.

Of the dissolution of partnerships.

We now come to the consideration of the modes in which a partnership may be dissolved, and of the effects and consequences attending such dissolution.

(1) Cowp. 814.

(2) Attorney General v. Burgess, Bunb. 97. 233. Rex v.

Manning, Comyn's Rep. 676.

(3) 5 Burr. 2686. Peake, 75. 4 T. R. 126.

A partnership may be dissolved —

1st, By act of the parties themselves :

1st, By effluxion of time under original agreement.

2d, By declaration.

3d, By mutual agreement.

4th, By interference of a court of equity.

2d, By act of God :

1st, Insanity.

2d, Death.

3d, By operation of law :

1st, By civil death.

2d, By bankruptcy.

3d, By marriage.

It frequently happens, that by articles of partnership a precise time is fixed for the duration of the contract; in that case the partnership is regularly dissolved by the effluxion or expiration of that time for which it was originally agreed between the parties to continue their compact for the purpose of carrying on their joint trade, with a view to their mutual benefit (1). And where a partnership is formed for a single dealing or transaction, as soon as that is completed the partnership is at an end.

1. Effluxion of time.

The right of partners to dissolve a partnership by declaration must depend upon the nature of the partnership, and whether by any stipulation between each other it must continue for a fixed period; if such stipulation exists, the parties must abide by it, unless under circumstances of improper conduct of one of the partners, such as gross fraud, or an entire exclusion of his other partner from his interest in the partnership, when courts of equity, it seems, will interfere (2). But if a partnership exists not under any contract as to its duration, either party has the power of determining it when he may think proper (3); and if a partnership for a limited time, with a right to dissolve upon giving a year's notice, be continued without any new agreement after the expiration of the limited time, such new partnership is dissoluble at the will of either party (4). The taking by a

2. By declaration of intention to dissolve.

(1) Watson, 381.; see post, when partnership continues after. (3) Peacock v. Peacock, 16 Ves, 56. 3 Ves. 74. 2 Bos. & Pul. 131.

(2) Peacock v. Peacock, 16 Ves. 17 Ves. 298.

56. Goodman v. Whitcombe, (4) Featherstonehaugh v. Fenwick, 17 Ves. 298.

partnership of a lease which is unexpired, or their entering into contracts which are unexecuted, does not deprive either party of his right to dissolve at his will (1). A partnership created by deed, where no specified time is mentioned as to its duration, should, it seems, be dissolved by an instrument of as high a nature; if created by parol, it may be dissolved by parol (2). Though a partnership may be dissolved at the will of either party at any time, yet a reasonable notice of the intention to dissolve must be given to the other partners, in order that the partnership concerns may be wound up; there is no fixed rule to determine as to what will be a reasonable notice, it must be left to a jury, or a court of equity, to consider, from the nature of the trade and other circumstances of the case (3). A partnership existing under a deed for a specified period, may be dissolved by deed between the parties, or, if existing under a parol agreement, it may be dissolved by parol agreement; and it seems that an arbitrator may dissolve a partnership, when all matters in difference between two partners are referred to him (4). We have before seen, that a partnership existing under an agreement that it shall continue for a specified time, prevents a party from dissolving it before the expiration of that time, unless with the consent of his other partners. In cases, however, where a partner so misconducts himself as to be injurious to the partnership, or his copartner, and defeats the object for which the partnership was formed (5); or where a partner is so insane, and in such a state of mind as to render him permanently incapable of transacting his business (6); or where a partnership is formed for a particular purpose, which becomes impracticable (7), a court of equity will decree a dissolution of the partnership. Indeed, in all cases where even a partnership may be dissolved without the interference of a court of equity, it may be most prudent, if the dissolution be opposed by one of the partners, to file a bill, praying a dissolution and an

3. By mutual agreement.

4. By interference of a court of equity.

(1) Featherstonehaugh v. Fenwick, 17 Ves. 298.

(2) Holt, C. N. P. 376.

(3) Peacock v. Peacock, 16 Ves. jun. 56. 17 Ves. 309.

(4) Green v. Waring, 1 Bla. 475.

(5) Goodman v. Whitcombe, 1 Jacob & W. 592. 16 Ves. 56. Liardet v. Adams, 1 Montague, 90.

(6) Huddleston's case, 2 Ves. 33. 1 Montague, 16. app. notes.

(7) Baring v. Dix, 1 Montague, 90.

account, and an injunction against using the partnership name. (1)

When a partnership has been dissolved, it frequently happens that it is only to make some alteration in the firm, and the partnership business goes on as before; in these cases the partner coming in, or retiring, generally pays or receives a sum of money in proportion to his share in the concern; if the business is to be given up, and the partners cannot arrive at any amicable arrangement, and there are no articles prescribing the terms of a dissolution, either partner may, upon that event, insist upon a sale and account of the joint property, and a division of the produce according to their interests (2). One or more partners therefore cannot legally insist on another, that he shall take his share at a valuation, or that he shall remove his proportion from the premises, thereby securing the good will (3). The share of each partner consists of his interest in the surplus, after the partnership engagements are discharged (4); but no dividend can be paid till that event (5). The partnership property consists of the remaining stock which existed at the formation of the partnership, with the additions made and obtained during the continuance of the partnership, for the purpose of the partnership concern (6). If a member of a firm, dissoluble at pleasure, privately obtain a renewal of a lease of part of the partnership premises, such lease is partnership property (7); but it does not follow that all the concerns conducted on the premises are partnership property (8). Upon the dissolution of a partnership, if there is a fair and *bona fide* transmutation (either in writing or not) of the partnership property by the outgoing partner to the remaining partner, or other person, without any fraud, the joint property of the firm becomes the separate property of the remaining partner, or such third person (9), and the assignment may

Consequences of dissolution of partnership, *inter se*.

Partnership property.

(1) *Exparte Nokes*, Montague, 559. 1 Show. 173.
93. 3 Ves. 74.

(2) *Featherstonehaugh v. Fenwick*, 17 Ves. 299. *Crawshay v. Collins*, 15 Ves. 221.; as to settlement of accounts among partners after dissolution, see *Watson*, 390.

(3) *Id. ibid.*

(4) *Croft v. Pyke*, 3 P. Wms. 1 Ves. 242. *Cowp.* 445. 15 Ves.

(5) 4 Bro. 423. 2 Ves. 244.

(6) *Thornton v. Dixon*, 3 Bro. 199. *Foster v. Hall*, 5 Ves. 308. *Balmain v. Shore*, 9 Ves. 500. *Smith v. Smith*, 5 Ves. 189.

(7) *Featherstonehaugh v. Fenwick*, 17 Ves. 298.

(8) *Id. ibid.*

(9) *Exparte Peake*, 1 Mad. 346. *Exparte Taylor*, 14 Ves.

be absolute or conditional (1). In general the profits of a partnership must stop the moment a party ceases to be a partner. If, upon the dissolution of a partnership, the remaining partners trade with the partnership stock, the outgoing partner is entitled to an account of the profits (2); but doubts have been entertained whether such outgoing partner is entitled to profits made after the dissolution by the remaining partners with the old stock mixed with property of their own (3). Courts of equity will on dissolution of a partnership sometimes appoint a receiver, but the mere dissolution of partnership is not of itself a sufficient ground for so doing; there must be some breach of duty of a partner, or of the contract of partnership, as by a party continuing to trade with the joint effects on the separate account, against the other partner's consent. (4)

Dissolution of partnership as to third persons, and its consequences.

A partnership may be dissolved as between the partners themselves, and still in effect continue to subsist as between them and the rest of the world. As credit is given to the whole firm, justice requires that all those who belonged to it should be bound while it is supposed to exist. To free themselves from this responsibility, they must give reasonable notice that they are no longer partners, and to such as may be considered to have had this notice, they will only be answerable for their own acts and agreements; otherwise the firm will be bound after the dissolution of the partnership by a contract made by one partner in the name of the firm, with a person who contracted on the faith of the partnership. As against persons who have not before had dealings with the firm, it seems that a notice of the dissolution of partnership published in the gazette is sufficient to discharge the retiring partner from liability (5); but as to parties who were customers of the firm, great precaution should be taken to withdraw the name from the firm, and to give a particular notice of the dissolution to each (6), and this notice is in

449. *Bolton v. Puller*, 1 Bos. & Pul. 547. *Exparte Ruiffin*, 6 Ves. 119. *Exparte Slow*, Cooke, B. L. 567. *Exparte Fell*, 10 Ves. 348. *Exparte Williams*, 11 Ves. 3. *Exparte Rolandson*, Rose, 416. *Young v. Keighley*, 15 Ves. 558. 2 *Campb.* 561.
- (1) 10 Ves. 348. 1 Rose, 416.
- (2) *Brown v. Vidler*, cited in *Crawshay v. Collins*, in 15 Ves. 223.
- 1 Jacob & W. 277. S. C. 17 Ves. 298.
- (3) *Crawshay v. Collins*, 15 Ves. 218. 1 Jacob & W. 277. S. C.
- (4) *Exparte Rel. Glover*, 18 Ves. 281.; see *Exparte Noakes*, 3 Ves. 74.
- (5) 1 Hen. Bla. 155. 3 Esp. Rep. 108. *Watson*, 209. 2 *Camp.* 561. 617. 1 Stark. 375.
- (6) *Peake*, 42. 154. *Cowp.*

all cases sufficient, though no notice has been inserted in gazette (1). Under circumstances, however, this notice will be presumed (2). An infant partner, on coming of age, must notify his discontinuance of being a partner, otherwise he will be liable (3). In all cases a reasonable notice must be given, and the reasonableness of such notice must be a question for a jury (4). A dormant partner, whose name has never been announced, may withdraw from the concern without making the dissolution of partnership publicly known (5). We have before seen, that if a partner disapproves of any transaction or contract into which his partner is entering, he may give distinct notice to those with whom his copartner is about to contract, that he will not in any manner be concerned in it, or hold himself liable; and by so doing the partnership is *quo ad hoc* dissolved or suspended (6). After notice of dissolution, the partnership cannot be bound by any fresh transaction of an individual partner; one partner therefore cannot bind the firm by a bill made and negotiated by him, nor by any fraud or contract, express or implied, entered into after the dissolution (7); and this although it were founded on the original liabilities of the partnership before or after the dissolution (8). The partnership rights and liabilities still exist as to transactions entered into by the partnership before the dissolution; therefore a payment, or delivery of goods, &c. to one partner, after a dissolution of a partnership, by virtue of an engagement entered into previous to the dissolution, binds the other partners; and more especially if, by consent of the partners, that one is left to manage and wind up the partnership affairs (9). And the mere consent or agreement by a creditor of the partnership to consider one only as liable after the dissolu-

449. 1 Esp. Rep. 371. 1 Sid.
127. 1 Stark. 71. 186. 418.
1 Mont. on Part. 105. 2 Stark.
290. 7 Price, 193.

(1) 7 Price, 193.

(2) 3 Campb. 147. 1 Moore,
466.; and when communication
has been made to a party that dis-
solution of partnership is intended,
non-fulfilment of such intention is
to be proved by creditor, to bind
the firm. 1 Stark. 71.

(3) 5 Barn. & Ald. 147. 1
Moore, 466.

(4) 16 Ves. 53.

(5) 4 Esp. 89.

(6) Ante, and cases there cited.

(7) Kilgour v. Finlayson, 1 Hen.
Bla. 155. 3 Esp. Rep. 108. 2
Campb. 561. 617. 1 Stark. 375.
1 Marsh. 248.

(8) 4 Esp. 89. 1 Marsh. 248.
3 Esp. 108.

(9) 13 East, 175. 1 Campb.
392. 2 Campb. 561. 2 Stark.
50. The admissions, &c. of a
partner after dissolution have the
same effect as those made during
partnership. 1 Taunt. 104.

tion, without any valid consideration, will not discharge the other partner, and they may be both joined in an action by such creditor (1). If one partner have the exclusive right in equity to all the debts and benefits of the partnership transactions, and a creditor have notice of that exclusive right, and that the debts and benefits are not to be paid or acquired by the other partner, a payment or benefit bestowed on the latter will not affect the rights of the former (2). If a partnership is dissolved, or new partners are admitted, a party who had previous dealings with the old firm, deals with the new firm, and still continues the same accounts, he does not thereby discharge the old firm (3); but if payments are made by such party, and the account is continued with an alteration of the partner's name, it seems that such payments are to be carried to the old account (4). And where the plaintiff kept a general account with A. as his banker and army agent, and B. became a partner with A. for a limited period, and retired on its expiration without the knowledge of the plaintiff, and A. afterwards became a bankrupt, until which period the account continued between plaintiff and A., it was held, that payments made by the latter to the plaintiff after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, B. might consider such payments as being made in reduction of the balance due at the expiration of the partnership, and that he was not accountable to the plaintiff for any sums received by A. on account of the latter, subsequent to such expiration. (5)

2. By act of God.

1. Insanity.

2. Death.

Insanity alone does not of itself necessarily occasion a dissolution of partnership; but under circumstances, courts of equity, as we have just seen, will effect a dissolution (6). The death of a partner of itself is in general a revocation of all express and implied authorities given by him, and dissolves the partnership, though it were for a term of years, unless there be an express stipulation to the contrary. (7)

(1) *Lodge v. Dicus*, 3 Barn. & Ald. 611.; see 2 Stark. 178.

(2) *Duff v. East India Company*, 15 Ves. 209. 1 Hen. Bla. 155. 2 Campb. 561. 3 Esp. 108.

(3) 4 Price, 200.

(4) 3 East, 488. *Bodenham v.*

Purchase, 2 Barn. & Ald. 39.

(5) *Brooke v. Enderby*, 4 Moore, 501. 2 Brod. & Bing. 70.; and see ante, 133. as to application of payments in general.

(6) Ante, 244.

(7) 3 Mad. 251. 314.

As between partners there is, generally speaking, unless there exists any stipulation to the contrary, no survivorship between them, either as to personal or real (1) property in possession, for each of their respective shares or degrees of interest go or descend to their personal representatives, or heirs, who become tenants in common with the survivor of all the partnership effects in possession (2). It has been determined that the goodwill of a partnership survives, but the authority of this decision seems questionable (3). A court of equity has barred survivorship, although the deceased partner, upon being informed that by law there would be survivorship, said he was content the stock should survive (4). But although there is no survivorship as to partnership property in possession, yet at law there is as to choses in action. To a share of these likewise, when reduced into possession, the representatives of a deceased partner is entitled; but as we shall hereafter see, the remedy with regard to them rests exclusively in the survivor. (5)

Consequences of dissolution by death;
Rights, &c. of partners, *inter se*, in case of.

Choses in action.

Within a reasonable time after the death of one partner, the survivor must *account* with the representatives of the deceased, and if not willing to do so, a court of equity will compel him (6). In taking partnership accounts after the death of a partner, the accounts must commence with the last stated account, and if there be not any stated account, it must commence with the partnership (7); and such accounts must end with the state of the stock at the time of the death of the partner, and the proceeds thereof, until it is got in (8). All errors in accounts settled during life-time of deceased partner may, by agreement between them, be conclusive after the death (9). If a surviving partner trade with the partnership stock, the representatives of the de-

(1) We have before seen survivorship in real property belonging to the partnership exists at law, but does not exist in equity, ante, 235, and cases there cited.

(2) 2 Bla. Com. 188. Co. 1. Inst. c. 3. s. 282. p. 182 a. Jeffreys v. Small, 1 Vern. 217. Devaynes v. Noble, 1 Mer. 564. 1 Ld. Raym. 281. Watson, 72.

(3) Hammond v. Douglas, 5 Ves. 539. acc. Crawshaw v. Col-

lins, 15 Ves. 218. 1 Jacob & W. 267. cont.

(4) Jeffreys v. Small, 1 Vern. 217.

(5) 2 Salk. 444. 1 Ld. Raym. 340. Lut. 1493. Show. 189.

Carth. 170. 3 Lev. 290, post.

(6) Watson, 365. 8 Ves. 317.

(7) Beak v. Beak, Finch, 190.

(8) Id. *ibid*.

(9) Gainsborough v. Stork,

Barn. 312. as to these accounts in general.

ceased partner are entitled to an account of the profits (1); and if it should appear upon a bill for discovery, and account filed by such representatives, that the surviving partner is carrying on a distinct trade with the debtors to the joint trade, and forbears to call upon the joint debtors for payment of the joint debts, the court, unless the survivor give security for payment of a moiety of the joint debts, will restrain him from receiving them, and appoint a receiver (2). The death of one partner is not alone a sufficient cause for the appointment of a receiver, but the death of both partners is (3). A surviving partner, who is executor of the deceased partner, or who carries on the trade with the children of the deceased partner, who succeed to the share of their parent, is not entitled to any allowance for his management of the trade after the death of the testator, without an express stipulation to the contrary. (4)

Consequences of
dissolution by
death as to third
parties.
Rights of sur-
viving partner.

No notice is necessary to third persons of the death of a partner (5); the partnership is dissolved, and all liabilities for subsequent acts cease. Upon the death of the member of a firm, the right of action is in the survivor (6). A partnership debt, upon the death of all but one of the partners, becomes at law a debt to the survivor in his own right, and he may set it off against his separate debt (7). So if in a separate commission, where all the joint property is seized by the assignees, and the solvent partner is dead, they may be compelled by bill to divide not only a moiety, but the whole, of the joint effects amongst the joint creditors (8). Upon the death of one partner, the survivor is to be sued alone for the partnership liabilities and obligations, for which he is liable to the full extent (9). But the surviving partner is not liable for the separate debts of the

Liabilities of
surviving part-
ner.

(1) *Brown v. Litton*, 1 P. Wms. 140. 5 Ves. 539. 8 Ves. 317. 15 Ves. 220. 1 Jacob & W. 267. S. C.

(2) *Estwick v. Coningsby*, 1 Vern. 218. 8 Ves. 317.

(3) *Phillips v. Atkinson*, 3 Bro. 272. 18 Ves. 281.

(4) *Burden v. Burden*, 18 Ves. 170. It seems that executors of one deceased partner, carrying on trade with the survivors for the

benefit of an infant, are personally responsible. 1 Maule & S. 412.

(5) 1 Mer. 570.

(6) 18 Ves. 170.

(7) 4 T. R. 493. 1 Esp. 47. 6 T. R. 582.

(8) 1 Ves. 236. 3 Bro. 459. S. C. 10 Ves. 98. 3 Ves. 400.

(9) 1 Mod. 45. Comb. 383. 12 Mod. 446. 2 T. R. 476. 6 T. R. 363. Carth. 170. 2 Lev. 228. 3 Lev. 290.

deceased partner, unless, after payment of all the joint debts, he have a surplus of the partnership effects in his hands. (1)

If the surviving partner has no property, the executors of deceased, though not liable at law, are so in equity, and under circumstances surviving partners have a right to insist, that the creditors of the partnership shall resort to the estate of the deceased partner (2); creditors indeed have always an equitable right upon the estate of the deceased partner, and, as it seems, *pari passu* with the other separate creditors, according to the degree of priority (3). There is no rule fixing any period within which a creditor shall make his claim upon the deceased's estate, and in general, till the partnership debt is actually satisfied, though the security may have been changed, the assets of the deceased are liable (4). Strong circumstances, however, will estop the creditor of this right, eight months non-claim, and payment in part by the surviving partners, does not waive it (5). If, on the death of a partner in a banking-house, the surviving partners carry on the business without changing the firm, and a creditor at the death of such partner continue to deal with the surviving partners, and is paid by them in part, this will not discharge the deceased's estate. (6)

Liabilities of the estate of the deceased partner.

A partnership may be dissolved by the civil death of a party, as by his outlawry, or attainder for treason or felony. The outlaw being dead in law, incapable of entering into any contract, bringing any suit, or holding any property, it is clear that a partnership in which he was, is *ipso facto* dissolved, and he is incapable of the functions of a partner in trade (7). The effects of his delinquency are extremely severe upon his copartner, as upon the outlawry or attainder of one, all the partnership effects become vested in the crown. The share of the partner outlawed or attainted is in the first place forfeited to the crown, whereby, if the king were capable of being so, he would become joint tenant, or tenant in common of the partnership effects with the other partners; but as this would be inconsistent with the dignity

By act of law, as
1. Civil death.

(1) Croft v. Pyke, 3 P. Wms. 182. 2 Eq. Ca. Ab. 397. pl. 12. 462. 1. 18.
(2) 17 Ves. 520. Watson, 368.
(3) Watson, 368. 3 Ves. 566. 573. 1 Mer. 530.
(4) 2 Ves. 265.
(5) 1 Mer. 566.; and see 1 Stra. 433. 2 Ves. 265.
(6) 1 Mer. 539. 569.; see 3 Ves. 279.
(7) Watson, 377.

of the monarch, he is strictly entitled to the whole (1). But this right of the crown is seldom enforced either against creditors or deserving partners.

2. By bankruptcy.

We shall now consider how a partnership may be dissolved, 1st, by the bankruptcy of the whole partnership concern; 2d, by the bankruptcy of one or more of its members only; and in this investigation will be endeavoured to be pointed out the consequences and effects attendant on these causes of dissolution.

Bankruptcy of whole partnership.

The bankruptcy of the whole partnership, or of an individual member, is of itself a dissolution of the partnership (2), as all the effects and funds are seized with which trade could be carried on, and no act afterwards done by one partner will bind the others (3). All the partners may become bankrupt together, or one only may become so, while the others remain solvent. Partners who have committed acts of bankruptcy are liable either to a joint commission against them all, or to separate commissions against each individually (4). A joint commission cannot be supported, unless each of the partners has committed an act of bankruptcy, and each partner must be found a bankrupt (5). A joint and separate commission, however, cannot be taken out and subsist together in point of law (6), but a separate commission may be superseded, and a joint one issued and supported, if for the advantage of the estate, and the latter can be fairly issued and supported (7); and a creditor ought not, unless under peculiar circumstances, to issue at the same time separate commissions against each member of the firm, instead of a joint commission against all the members (8). A joint commission

(1) Watson, 377. 2 Bla. Com. 252. 138. Davies, 431. 8 Taunt. 409. Fitzh. Abr. t. Dette, 38. 176. Plowd. 243. Cro. Eliz. 263. (7) 6 Ves. 484. 16 Ves. 237. Finch, 178. Co. Lit. 30. 476. 1 Beames, 61. But in general the petitioning creditor

(2) 4 Price, 164.

(3) 10 East, 418. 426, 7.

(4) Cullen, B. L. book 5. c. 1. s. 1. Watson, 242.

(5) Beasley v. Beasley, 1 Atk. 97. Cooke, 7. As to what amounts to an act of bankruptcy by a partner, see 5 Ves. 576. 8 T. R. 140. 17 Ves. 200. 1 Montague on Part. 143. 4 Moore, 126. 322.

(6) 2 P. Wms. 499. 1 Atk.

476.

(8) 1 Beames, 160. 1 Atk. 252. 15 Ves. 115. 539. 16 Ves. 237.

must include all the ostensible members of the firm (1); when the title of the firm has the general word "company," the creditor ought to ascertain the members who constitute the partnership (2). A joint commission cannot be supported against the whole firm, or against the other partners, where one of the partners is an infant (3), or a lunatic (4), or an uncertificated bankrupt (5); subject to the latter doctrine a joint commission may be supported against all the partners, excluding or including a dormant partner (6); but it must appear that a partner, if omitted, was really a secret and dormant partner, for if there were any means of knowing his connection with the partnership, his omission will be fatal; and it has been held that when the title of a firm has the general word "company," the creditor ought to ascertain the members who constitute the partnership (7). The assignment under a joint commission passes all the joint property and the separate property of each partner, and after assignment no property of any kind remains in the bankrupts, but all they had a right to up to the time of the bankruptcy passes to the assignees (8); the assignees, however, are not entitled to goods fairly consigned by one of the firm when solvent, after an act of bankruptcy unknown to him committed by his partner (9). Under a joint commission of bankruptcy against partners, the assignees, who must be joint creditors (10), are to keep distinct accounts of the joint and separate estates of the bankrupts; the joint property of all the partners, and the separate property of each, both pass under the same commission (11), but they do not form the same fund, and are not to be applied to the same purposes. At law the separate creditor of a partner may take either the separate property of his debtor, or his debtor's share in the joint property, or both if necessary; and a creditor of the partnership may take the whole joint property, or the whole separate property of any one partner. Under a commis-

(1) Cooke, 7. Willes. 474.
4 Ves. 163. 5 Ves. 424. 6 Ves.

434. 3 T. R. 799.

(2) 6 Ves. 434.

(3) 4 Ves. 163. 6 Ves. 434.
Id. 601. 1 Ves. 131.

(4) 6 Ves. 601.

(5) 15 Ves. 114.

(6) 5 Ves. 424. 6 Ves. 434.
4 Ves. 761. 17 Ves. 404.

(7) Watson, 248. 6 Ves. 434.

(8) *Ex parte Cooke*, 2 P. Wms.
500. 1 Atk. 98. 4 Burr. 2174.
1 Bos. & Pul. 539.

(9) *Fox v. Hanbury*, Cowp. 445.
4 Burr. 2174.

(10) 18 Ves. 70. Rose, 321.

(11) As to what is partnership
property, see ante.

sion, however, the property seized, whether joint or separate, is no longer disposed of as at law; but falling immediately under the administration of the court of chancery, the effects are subject to a mode of distribution amongst the different classes of the creditors, founded as well upon the equity of that court as upon the general intention of the statutes, that all creditors should have an equal satisfaction (1). It has, accordingly, been long established as a rule of that court, that where there are different sets of creditors each estate shall be applied exclusively in the first instance to the payment of its own creditors, the joint estate to the joint creditors, and the separate to the separate; and that neither the joint creditors shall come upon the separate estate, nor the separate upon the joint, but only upon the surplus of each that shall remain after each has fully satisfied its own creditors respectively. In conformity to this rule of distribution, separate creditors have never been permitted to come in directly upon the joint estate with the joint creditors; but as the assignment under a joint commission is of the whole estate, as well of the separate estate of each partner as of the joint estate of all the partners, separate creditors have always been allowed to prove under a joint commission, for the purpose of receiving dividends from the separate estate in the first instance, and afterwards from the surplus of any of the joint estate, after the joint creditors are satisfied. The commissioners having no original authority for this purpose, a special order was given in every particular case, but latterly it has been done by a general order, to save the expence and delay of the former practice. The rule of distribution above laid down, is sufficiently clear and simple in itself, but considerable difficulties have arisen in applying it; as the separate estate may be more than sufficient to satisfy all the primary demands upon it, while the joint estate amounts scarcely to any thing, or *vice versa*, it is often of the utmost importance to determine what is to be considered joint and what separate property, and what are to be considered as joint and what as separate debts. Little difficulty occurs with respect to the nature of the property where the bankrupts are not, at the time of the bankruptcy, and have not been before, connected with any other firm; but it sometimes happens that a change has taken place in the members of the partnership, or that there are subordinate and distinct partnerships between certain of the

(1) See 1 Mer. 530.

members of the principal one. To adjust the clashing interests and claims of solvent partners; and of different classes of creditors, under such complicated circumstances, is necessarily a matter of much nicety. It is settled, that if upon a dissolution of partnership one partner withdraws, and the partnership effects are made over to the others, who continue the trade, and against whom a commission of bankruptcy afterwards issues, all the effects of the old partnership found in specie amongst the property seized under the commission, vest absolutely in the assignees; and that, though there be outstanding debts of the former firm unsatisfied, these effects so found in specie will not be considered as the joint estate of the former firm, either for the benefit of joint creditors or the partner who has withdrawn. (1)

The commissioners in a joint commission may, at any meeting for the proof of debts, admit the proof of any separate debt (2); one partner may prove a debt on behalf of his firm (3), and vote in the choice of assignees (4). With regard to joint and separate debts, it may be laid down that all debts are provable against the joint estate for which the partnership is liable. Although this was never doubted, a question has arisen as to the law when one partner is at the same time liable to himself; it is settled, however, that when the credit has been joint, the creditor may be admitted on the joint estate, notwithstanding he has taken a separate security (5). Though in general when the credit is separate the debt does not become joint from a subsequent application of the funds by the debtor to the uses of the partnership of which he is a member, yet when new partners are admitted, and the debts of the old firm are, with the consent of the new partners, acknowledged to be debts of the new firm, a debt of the old firm may be proved as a debt of the new firm (6). Where a creditor has a joint and separate security, either by the same instrument or by different instruments, he must elect whether he

Proof of joint
and separate
debts.

Election of
proof.

(1) *Watson*, 262, 3, 4. 6 *Ves.* joint debt, see *Watson*, 276.
119. *Cowp.* 117. 10 *Ves.* 347. 5 *Ves.* 189. *Montague*, B. L. 625.
(2) 1 *Mont. on Part.* 143. 1 *Atk.* 3 *Bro.* 265. 5 *T. R.* 601. 3 *Ves.*
67. *Davies*, 373. 400. 7 *Ves.* 592. 8 *Ves.* 540.
(3) 1 *Mont.* 130. 1 *East*, 53. 2 *Hen. Bla.* 379.
(4) 14 *Ves.* 597. 4 *Ves.* 163. 1 *Gow. C. N. P.* 17.
(5) *Watson*, 274. 1 *Atk.* 225.; (6) 1 *Ves.* 131.
and as to what is a separate or

will proceed against the joint or separate estate (1). When the creditor has elected, and there is a surplus from the estate which he has rejected, he is entitled with the other creditors of the estate which he has accepted, to his share of the surplus, but he has not any preference to them (2). The creditor is entitled to a sufficient time to make his election (3); he need not elect till a dividend is declared, or until the assignees are possessed of a fund to make a dividend (4); when the parties were assignees, and had sufficient funds to make a dividend, they were ordered to elect in a fortnight (5). A creditor who has proved against the joint estate may waive his proof, and prove against the separate estate (6). In some cases a creditor may make a double proof, both against the joint and separate estate. (7)

Double proof.

Rights between partners.

One partner may take a dividend in a commission against his partner when there is not any competition with the joint or separate creditors, but not otherwise (8); when there are different and distinct firms, consisting partly of the same members, and one firm is solvent and the other bankrupt, it seems that the solvent firm cannot take a dividend against the bankrupt firm, in competition with the joint creditors (9). If after payment of the joint and separate creditors, there is a surplus upon a separate estate, which is indebted to the partners, the separate creditors are entitled to interest from the date of the commission, before any dividend can be received by the partners (10); if the surplus of the joint estate is not sufficient to pay all that is due from one partner to the other partner, the partner is entitled to a dividend with the separate creditors (11). Separate creditors cannot take a dividend from the joint estate in competition with the joint creditors (12), but they might if the funds of the partner were fraudulently taken from his separate estate to increase the joint

Right of separate creditors against joint estate.

(1) 3 P. Wms. 405. 1 Atk. 98. Cooke, 249. 2 Bro. 595. 9 Ves. 223. 107. 15 Ves. 4. Rose, 159. 1 Mont. on Part. 123.

(2) 10 Ves. 107. 8 Ves. 540. sed vide 3 P. Wms. 405.

(3) 3 P. Wms. 405. 1 Atk. 98.

(4) Id. Cooke, 250.

(5) Cooke, 250.

(6) 1 Mont. on Part. 125. and cases there cited.

(7) 1 Mont. on Part. 127. and cases there cited.

(8) 17 Ves. 521. 1 Mont. 137. 9 Ves. 589.

(9) 1 Rose, 305. qu. If they can against separate creditors.

1 Mont. 137. Rose, 69.

(10) 9 Ves. 588.

(11) 17 Ves. 116.

(12) 1 Mont. 132. and cases there cited.

property (1). So joint creditors cannot take a dividend from the separate estate in competition with separate creditors (2). When there are different and distinct firms, consisting partly of the same members, and one of these firms is indebted to the other, and both firms become bankrupts, proof may be made for such debt as if the dealings had been between strangers; but the firms must be distinct to admit such proofs (3). When there have been different partnerships, and a joint commission against the firm, including all the partners, the creditors of each of the firms, and of each partner, must be paid out of the respective funds belonging to the estate which they have trusted, and the surplus, if any, of either of the estates, must be applied to some deficient fund (4). When there is a surplus upon the joint estate, after payment of all the joint creditors, the separate creditors of each partner have a lien upon his interest for the surplus (5). If the deficiency upon a joint estate is supplied by a surplus from the separate estate, the joint creditors are entitled to interest out of such surplus from the date of the commission (6); when there is a surplus upon the separate estate, and a deficiency upon the joint estate, such surplus must be carried to the joint estate in preference to payment to the separate creditors of any interest from the date of the commission (7). If there is any surplus upon a separate estate, which is indebted to the joint estate, the separate creditors are entitled to interest from the date of the commission, before any dividend can be received by the joint creditors upon such debt (8). One partner, without consulting the other members of the firm, may sign a bankrupt's certificate, either during the continuance of the partnership, or after dissolution, upon a debt proved during the partnership (9). The certificate under a joint or a separate commission discharges the bankrupt from all his debts both joint and separate (10). The certificate of one partner does not discharge the other from any joint debt (11).

Right of joint creditor against separate estate.

Rights between creditors when there are different firms.

(1) 1 Rose, 438. Montague on P. 132. 1 Atk. 225.

(2) Cooke, 562. 564. 1 Ves. 166. 1 Atk. 224.

(3) 11 Ves. 414. Davies, 467. 1 Atk. 133. 9 Ves. 35. 3 Ves. 238.

(4) 2 Bro. 15. Cooke, 538. 5 Ves. 743. 8 Ves. 540.

(5) 17 Ves. 117

(6) 9 Ves. 588.

(7) Cook, 199. 9 Ves. 590.

(8) 9 Ves. 588.

(9) 1 Mont. 131.

(10) 3 P. Wms. 23. 1 Atk. 67. Davies, 431. Fitz. 281. Stra. 1143.

(11) 2 Ch. Ca. 149. 1 Mont. on Part. 131., and cases there cited.

If, after the signature by the creditors, and the commissioners certificate of conformity, one of the partners, against whom a joint commission has issued, die, the chancellor will order the joint certificate to be inserted in the gazette, as the separate certificate of the survivor (1). Under a joint commission a partner cannot have two allowances, the one in respect of his joint and the other in respect of his separate estate (2). It seems that a sufficient dividend to the joint creditors, and an insufficient dividend to the separate creditors, will not entitle the bankrupt to an allowance (3). If in a joint commission the separate creditors have been fully paid, and the joint creditors have been paid sixteen shillings in the pound, but the estates of the partners have contributed in different proportions to make these payments, the allowance must be divided between them according to the proportions which the surplus of each of their separate estates, and the respective moieties of their joint estates, have contributed to the payment of their joint debts (4). If a commission issue against a firm, where one of the partners is dead at the time of issuing, it is said to be void (5); but the commission does not abate by the death of one of the partners after the bankruptcy has been found.

Sometimes it happens that one partner only commits an act of bankruptcy, while the others remain perfectly solvent, or that through the infancy or lunacy of one of several partners, a joint commission against the firm cannot be sustained, in such cases a separate commission must be sued out against each of the bankrupt partners. The trading and act of bankruptcy will be the same as in ordinary cases (6). A joint debt from a firm will support a separate commission against either of the partners (7), but no partner can support a commission against his copartner, unless there has been a settlement or balance of accounts, or the partnership has been determined, and the solvent partner has paid all the debts (8); but a partner, by suing out a commission against his copartner, frequently incurs many

(1) *Exparte Currie*, 10 Ves. 51. Part. 147.

(2) *Exparte Bate*, 1 Bro. 453.

(3) *Exparte Stiles*, 1 Atk. 208.

(4) 1 Bro. 453.

(5) 1 Atk. 97. 5 Ves. 295.

(6) As to what amounts to this act of bankruptcy, see 1 Mont. on

(7) 4 Price's Rep. 164. *Davies*, 460. *Willes*, 467. 1 Atk. 133.

9 Ves. 35. 3 Ves. 238.

(8) *Exparte Noah's MSS.* 1 Mont. on Part. 147. 1 Ves. 239.

disadvantages (1). A joint creditor, who is not the petitioning creditor, cannot, without the lord chancellor's order, prove under a separate commission, unless there is not any joint estate, or a solvent partner (2); but the petitioning creditor may prove under a separate commission, without any order (3). A joint creditor may prove under a separate commission, without any order, if there is not any joint estate, or a solvent partner (4). The proof of a joint creditor cannot be rejected, because there was a solvent partner after the issuing of the commission, if he is insolvent when the proof is tendered (5). If a solvent partner pay partnership debts after a commission has issued against his partners, it seems that such payments may be proved by him under the commission (6). The electors of the assignees are the separate creditors, and the petitioning creditor, whether joint or separate, and when there is not any joint estate, or a solvent partner, every joint creditor is entitled to vote (7). Joint creditors cannot vote, when there is only one separate creditor, and large joint property (8). If a separate commission be issued on the petition of a joint creditor, and there is but one trifling separate debt, the joint creditors, upon payment of the separate creditors, and consent of the petitioning creditor, may prove, for the purpose of voting in the choice of assignees (9). The lord chancellor has refused to vacate a choice of assignees, made by joint creditors under a separate commission, when they applied and were admitted to prove as separate creditors (10); in some cases, representatives have been appointed to attend to the interests of the joint creditors (11). By a separate commission against a partner (12), all the effects and funds of that partner are seized with which the partnership trade or concern can be carried on, and the partnership is dissolved, and by the act of bankruptcy, all that an individual member does is avoided, and the joint tenancy between him and the other partner ceases; and the dissolution, it seems, has relation to the act of bankruptcy (13).

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| (1) 4 Price, 164. | 17 Ves. 250. 18 Ves. 70. |
| (2) 1 Mont. 148., and cases
there cited. | (8) 11 Ves. 603. |
| (3) 9 Ves. 349. 14 Ves. 604. | (9) 9 Ves. 35. |
| 17 Ves. 250. | (10) Rose, 315. |
| (4) 1 Mont. on Part. 148. | (11) Rose, 266. 17 Ves. 250. |
| (5) Ibid. | 18 Ves. 70 |
| (6) 49 Geo. 3. c. 121. s. 9. | (12) 4 Price, 164. 1 Mont. 91. |
| (7) 9 Ves. 349. 14 Ves. 602. | (13) Cowp. 448. 4 Burr. 2174. |
| | Watson, 302. 5 Ves. 295. |

Doubts have been entertained as to the consequences with respect to the solvent partner of a joint creditor issuing a separate commission (1). The proof of a joint debt, under a separate commission, does not discharge the solvent partner (2); if to enable a joint creditor, who has proved under a separate commission, to recover from the solvent partners, it is necessary to join the bankrupt in the action, the creditor must indemnify the bankrupt against all the expences of the action, and cannot take advantage of the judgment against him : courts of common law will not allow a *nolle prosequi* to be entered against the bankrupt (3). The assignment under a separate commission passes all the property of the bankrupt, that is, all his separate property, and all his interest in the joint property (4); the interest of the solvent partner is not affected by the bankruptcy (5), the assignees are tenants in common with him from the time of the act of bankruptcy (6) of an undivided share of the partnership property, subject to the rights of such partner, and the account to be taken between them as partners (7). But this equitable interest of the assignees in the partnership property is more extensive than the equity of a tenant in common, where there is no bankruptcy (8). If, indeed, the solvent partner is abroad, the whole estate is administered in bankruptcy (9); and in a separate commission, where all the joint property is seized by the assignees, and the solvent partner is dead, they may be compelled by bill to divide, not only a moiety, but the whole of the joint effects amongst the joint creditors (10). If one partner advance part of his share of the expence of an adventure, and give his notes for the remainder, which are not due till after his bankruptcy, the assignees are entitled to his full share of the profits

(1) 1 Mont. on Part. 160.

(2) 49 Geo. 3. c. 121. s. 14.

(3) 1 Beames, 347. Rose, 460.

(4) Anon. 3 Salk. 61. Horsey's case, 3 P. Wms. 23. Dougl. 627. 1 Bro. 576. 2 Bro. 5. 1 Bos. & Pul. 539. 1 Atk. 185. 1 Taunt. 319.

(5) 3 Salk. 61. 12 Mod. 446.

(6) 1 Mont. 91. Watson, 302. Cowp. 448. 4 Burr. 2174. 5 Ves. 295.

(7) 12 Mod. 446. Cowp. 449. 11 Ves. 78. 81. 85. 17 Ves. 294. 1 East, 367. 4 Burr. 2174. 2

Vern. 293. 1 Ves. 232. 4 Ves. 396. 3 Vern. 293. Davies, 371. 6 Ves. 127. The assignees and solvent partner must join in action to recover property. 10 East, 425. 2 T. R. 282. 1 Campb. 279.

(8) Barker v. Goodair, 11 Ves. 85. 1 Mont. on Part. 154.

(9) Barker v. Goodair, 11 Ves. 86. 1 Ves. 236.

(10) Hankey v. Garret, 1 Ves. 236. 3 Bro. 459. 10 Ves. 98. 3 Ves. 400.

of the adventure (1). If property be left in the possession of a bankrupt partner at the time of the bankruptcy, the assignees may take the whole property, and sell it, and though the assignees cannot trade in new adventures with the solvent partners, yet in some cases they may do so, with the consent of the creditors and the bankrupt; but in both these cases, the solvent partner is entitled to an account of the profits (2). The obligation to settle the partnership accounts is not more imperative upon the assignees than upon the solvent partner (3), though indeed the assignees may, by petition or bill in chancery, be compelled to keep distinct accounts of the separate and joint estate (4), so, on the other hand, the assignees are entitled to an account, and to a participation of subsequent profits, made by the solvent partners, trading with the capital at the time of the bankruptcy or afterwards (5); but the assignees, it seems, by filing a bill for an account of profits made by the solvent partners after the bankruptcy, make themselves personally responsible for losses (6). When there is joint estates, or a solvent partner in England, no joint creditor, except the petitioning creditor, is entitled to a dividend from the separate estate, until there has been an inquiry of the sum forthcoming from the joint estate (7). The certificate under a separate commission discharges the bankrupt from all his separate and from all his joint debts (8), but it does not discharge or affect the solvent partner (9). If, under a separate commission, the joint estate pay part of the bankrupt's debts, and the separate estate the remainder, the bankrupt is not entitled to any allowance (10). The allowance to a bankrupt under a separate commission is the same as in ordinary cases. If a commission describe the bankrupt incorrectly, where such description is not essential, and may be injurious, the chancellor will not supersede the commission, if there is not any malice in the proceeding, nor will he suffer any alteration to be made in the description (11). Upon the superseding of a joint or separate

(1) *Smith v. De Silva*, Cowp. 469.

(2) *Crawshay v. Collins*, 15 Ves. 218. 1 *Jacob & W.* 267. *Smith v. Stokes*, 1 East, 369.

(3) *Crawshay v. Collins*, 15 Ves. 218.

(4) *Cooke*, B. L. 244.

(5) *Crawshay v. Collins*, 15 Ves. 229.

(6) *Id. ibid.*

(7) 3 Ves. 238.

(8) 3 P. Wms. 23. 1 Atk. 67. *Davies*, 431. *Fitz.* 281. *Str.* 1143.

(9) 10 Ann. c. 15. s. 3.

(10) *Ex parte Farlow*, Rose, 421.

(11) 9 Ves. 207. 5 Ves. 295.

2 Beames, 29.

commission of bankruptcy, the partnership revives, and is in the same state as if the commission never existed, and the parties against whom it was directed are restored to all the rights they enjoyed before it was sued forth. (1)

a. By marriage.

The effect of the marriage of a *feme sole* partner has never been expressly decided upon, but it would be probably held to operate as a dissolution of partnership. However women are not unfrequently entitled to shares in banking-houses and other mercantile concerns, under positive covenants; when this happens, their husbands are entitled to such shares, and become partners in their stead. (2)

Remedies of
partners *inter se*.

At law one partner or tenant in common cannot in general sue his copartner or cotenant in any action in form *& contractu* (3), but must proceed by action of account (4), or by bill in equity; a rule founded on the nature of the situation of the parties, the difficulty at law of adjusting complicated accounts between them, and the propriety arising from the confidence reposed by the parties in each other of their being examined upon oath, which can only be effected in a court of equity (5). Therefore one partner cannot at law recover a sum of money received by the other on account of the firm, unless on a balance struck that sum is found to be due to him (6); or if one of two or more partners expressly covenant or agree to account, &c. and neglect to do so, an action may be supported by the others (7); and if an account be stated, and one partner expressly promise to pay the balance appearing to be due to the other, the latter may sue at law (8). So one joint contractor who pays for another the whole, or a particular part, which the contractor had engaged to pay, may recover it from the latter as money paid to his use (9). In the case, however, of a general unsettled account between partners, one who has been compelled

(1) Watson, 357.

(2) Watson, 384.

(3) 2 T. R. 478. 2 Bos. & Pul.
124. 4 East, 144. 4 Esp. Rep.
182. 2 Marsh. 319. 324. 6 Taunt.
597. 2 Moore, 393. A party can
never be plaintiff and defendant
also. 2 Marsh. 319. 324.

(4) Bac. Abr. tit. Account.
Willes, 208.

(5) 1 Chitty on Plead. 27.

(6) 2 T. R. 478.

(7) 2 T. R. 482. 7 Mod. 116.
13 East, 8. 538.

(8) Ibid.

(9) 6 Taunt. 289. 1 Marsh.
Rep. 603. 1 East, 29. 13 East, 7.
8 T. R. 614. Roll. Abr. tit. Ad.
sur le Case, pl. 31. 3 Campb. 168.
2 Bl. 947. 5 Ves. 792.

to pay the whole of a creditor's demand, cannot sue his copartner at law (1), but must resort to a court of equity (2). In the case of a personal chattel, or of trees severed from the land, if one of two or more joint tenants or tenants in common, by the sale thereof convert the thing into money, the joint interest is determined, and each hath a separate interest for a sum certain, and may support money had and received against the other (3); and one partner may maintain an action for money had and received against the other partner, for money received to the separate use of the former, and wrongfully carried to the partnership account (4); and a partner may recover money paid to his copartner for the purpose of being paid over as the plaintiff's liquidated share of a debt to their joint creditor, if it be not so applied, and the plaintiff be obliged to pay such joint creditor (5). So one of several sureties in a bond, who has been obliged to pay more than his proportion, may recover against any one of the others his proportion of the money paid under the bond (6). And an action at law is sustainable to recover a contribution in the nature of general average, by one shipper of goods against another (7); and unless there be a partnership, one of several parties interested in profits may, in general, proceed at law against a person who has received his share; thus, if a sailor engage in a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the captain, and shall not be considered as a partner (8), and when the agreement between two does not constitute a partnership as between themselves, but only an agreement in favour of one, as a compensation for trouble and credit, he may sue the other, though as between third persons both might be liable as partners (9). One partner cannot maintain trover against his companion for partnership property in possession, but he may, if the latter destroy the partnership property. (10)

(1) 1 Stark. 78, 9 8 T. R. 186.

(2) 5 Ves. 792. 1 East, 20.

(3) Willes, 209. 8 T. R. 186.

(4) 2 T. R. 476.

(5) 1 East, 20. 6 Taunt. 289.

(6) 2 Bos. & Pul. 268. 279. 401.
8 T. R. 614. 2 T. R. 100.

(7) 3 Campb. 480. 1 East,

220. 4 Taunt. 123.

(8) 4 Esp. Rep. 182.

(9) 4 East, 144.

(10) Bul. N. P. 34. 4 East, 121.

Barton v. Williams, 5 Barn. & Ald.

Bill in equity
inter se.

The most advisable course to be adopted, where one partner has reason to complain of another concerning pecuniary transactions, is to file a bill praying a discovery, and that the defendant may account (1), and it is not necessary that in the same bill he should pray a dissolution (2). The court will in general decree an account to be given: the defendant may plead in bar an account stated, which must shew that the account was in writing, or at least must set forth the balance; if error or fraud are charged, they must be denied by the pleas, as well as by way of answer; and if neither error nor fraud is charged, the defendant must by the plea aver that the stated account is just and true, to the best of his knowledge and belief (3). Where persons have mutual dealings, signing the account is not necessary to make it a stated one; keeping it any length of time without making an objection will bind the person to whom it is sent (4). Among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it by the second or third post (5). Though length of time is no bar between merchant and merchant whilst their accounts are going on, yet dealings having ceased many years between them, and after disputes, there having been an acquiescence till the death of one them, the court of chancery will not decree an account with the survivor, but leave the plaintiff to his remedy at law (6). A partner praying a bill for a discovery and an account must appear in court without making any illegal or improper claims upon the defendant; and therefore if one partner borrows money out of the general partnership trade, his own share shall be answerable for it, and he shall not be permitted to come into equity and pray an account, without making satisfaction for the debt (7). Besides filing a bill for an account, the plaintiff may pray for a dissolution of the partnership (8); and where his copartner is embezzling the partnership effects, he may obtain an injunction against his acts,

(1) Watson, 409. 2 Atk. 570.
See 3 Mer. 297. As to jurisdiction in equity over corporations in this respect as relating to injured members, see 17 Ves. 524.

(2) Harrison v. Armitage, 4 Mad. 143.

(3) Mitford's Pleadings, 208.

(4) Willis v. Jernagan, 2 Atk. 252.

(5) Watson, 411. 2 Vern. 276.

(6) 2 Vern. 276. Watson, 412.

(7) Abr. Eq. Ca. 9 Trin. 1728. Watson, 411.

(8) See post.

and the appointment of a receiver, although the court will not appoint a receiver of the effects of a subsisting partnership, unless on the grossest abuses of some of the partners (1). So partners may settle their disputes by agreement amongst themselves, as by reference to an arbitrator, and a court of equity will consider his award as final, and will not disturb it, unless some specific and peculiar objections are made to it (2); but a covenant or agreement to refer to arbitration is no bar to any proceeding at law or in equity by one partner against the other (3).

Reference to arbitration.

In actions against strangers those who were partners in the contract at the time of entering into it should join as plaintiffs; as all contracts by and with partners are joint, it follows that in actions of contract all the members of a mercantile house should be included as parties (4). And dormant partners may be made plaintiffs in a suit (5), though not necessarily so (6); but a dormant partner cannot be joined, if his apparent and ostensible partner represented himself as the sole contractor (7); and nominal partners need not be joined, if they really had no interest in the concern, unless the defendant's rights would be affected (8). Infants must join in actions brought by their partners (9), though they cannot be jointly sued with others (10). It is seldom that one can suffer a tort as a partner (11). However, where an injury has accrued to the partnership effects, all the partners should regularly join. (12)

Remedies of partners against strangers, during existence of the partnership contract.

In an action on a contract all the persons who were ostensibly partners at the time of entering into the contract

Remedies of strangers against partners, during

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| (1) <i>Oliver v. Hamilton</i> , 2 Anstr. 453. 1 <i>Jacob & Walker's Rep.</i> 252.. 589. | (6) 2 Taunt. 324. 2 Esp. 468. 7 T.R. 361. n. |
| (2) 2 Anstr. 519. 2 Atk. 395. 501. 3 Atk. 529. 644. | (7) 1 Maule & S. 249. 2 Moore, 153. |
| (3) 1 Wils. 129. 2 Bos. & Pul. 131. 2 Ves. jun. 129. 8 T.R. 139. | (8) 3 Esp. 238. 14 East, 210. 5 Esp. 199. 2 Campb. 302. 1 Stark. 25. 250. 1 Marsh. 246. |
| (4) 1 Montague, 59. Watson, 419. 2 T. R. 282. 1 Esp. 182. 1 East, 497. 1 Taunt. 7. 2 Campb. 190. | (9) 14 East, 210., but he must sue by <i>prochein amy</i> . 2 Saund. 212. |
| (5) 4 Barn. & Ald. 437. 1 Mars. 246. Godb. 90. 2 Taunt. 324. 6 Ves. 438. | (10) 4 Taunt. 468. (11) Watson, 423. Cro. Car. 513. 3 Bos. & Pul. 150. (12) 5 Vin. Abr. 59. pl. 21. |

existence of
partnership
contract.

must in general be joined (1), and any agreement amongst each other as to which shall be liable, will have no effect upon a third party; there may be, however, in some cases, a change of credit by agreement between the parties, so as to transfer the liability from the original contracting party to one only of the firm (2). Dormant partners (3), and mere nominal partners (4), need not be made defendants in a suit or bill, either at law or in equity. An infant partner should not be joined (5), but a bankrupt partner at the time of entering into the contract, though he has obtained his certificate, must be joined (6). If several partners jointly commit a *tort*, the plaintiff has his election to sue all or any of the members, because a *tort* is, in its nature, the separate act of each individual; but if in legal consideration several parties cannot concur in the act complained of, the action must necessarily be against them separately and not jointly (7). When an action is brought in case, where in fact the ground of complaint is merely for the nonfeasance of a contract, all the parties to the contract must be included (8). In an action against all the partners, no difficulty arises in taking their property under an execution, for the whole of the partnership effects may be seized and sold, as if they were the sole property of one defendant. Where there is execution against one of two partners, the sheriff must seize all the goods, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety, but he must seize the whole and sell a moiety thereof

(1) 1 Mont. 65. 7 T. R. 257. 58. 6 T. R. 369.

(2) 1 New Rep. 124. 131. 4 Esp. 91, 2. 5 Esp. Rep. 122. 8 T. R. 451. 3 East, 147. 2 Campb. 99.; see instances of this, and of a new firm adopting a debt of an old firm, and thereby becoming liable. 1 Mont. on B. L. 619, 620.

(3) 17 Ves. 412. 19 Ves. 294. 458. 3 Ves. & B. 126. 3 Price, 538. 1 Stark. 338. 272. 4 Maule & S. 475. 7 T. R. 361. 6 Ves. 438. acc. 1 Marsh. 246. cont.; but they must be really dormant, and if a party might have discovered him, he must be joined.

6 Ves. 438.

(4) 2 Campb. 302. 14 East, 210. 1 Stark. 25. 1 Marsh. 246.

(5) 3 Esp. 76. 1 Wils. 89. 4 Taunt. 468.

(6) 2 Maule & S. 23. 444. 6 Taunt. 179. 4 Taunt. 326.; see post.

(7) As to who may be joined as defendants in general in this respect, see 1 Chitty on Plead. 76. 78. Watson, 424. Bunb. 223. 5 Burr. 2611. 5 T. R. 649.

(8) 12 East, 454. 2 New Rep. 454. 12 East, 89. S. C.; and see 2 New Rep. 365. 6 T. R. 369. 3 East, 62. Ansell v. Waterhouse, 1 Chitty on Plead. 78. n.b. 2 Ch. Pr. Rep. 1. 3 Brod. & B. 54. Id. 171.

undivided, and the vendee will be tenant in common with the other partner (1). Upon the execution of a separate creditor against the partnership effects, he must render an account (2). Under circumstances, however, courts of equity will relieve against an execution upon the partnership effects; for they consider that the interest of each partner therein is only what remains after the partnership accounts are taken, and as the creditor cannot be entitled to any more than what his debtor possessed, an account must be taken before the fruits of an execution upon the partnership effects can be reaped (3). Upon a separate judgment against a dormant partner, whose interest is confined to the profits, but does not extend to the capital, it seems that the creditor cannot issue execution against the effects of the partnership, subject to an account (4). But it is in equity only that relief can be obtained. In such cases a court of law has no right to restrain an execution against partnership effects, or to direct an inquiry into the accounts of the interest of the partner who is sued (5), though it may inquire into any abuse of its process (6). The partnership effects may be seized and sold under mesne as well as final process (7).

The rules of law as to joining dormant and other partners in an action at law, apply to proceedings in equity. In a bill against one partner for a joint demand, where the other partner is, from being out of the kingdom, not amenable to the court, the partner before the court is liable for the whole demand (8). If a bill be filed against two partners, of whom one is abroad, and the defendant in England admit that he is agent of the partner abroad, service of the *subpœna* upon the partner in England, or upon his clerk in court, will, upon motion, be ordered to be good service (9). If one of two joint owners of a cargo deposit part of the cargo with a factor to sell, and hold a moiety of the proceeds for a separate creditor of such joint owner, and the creditor file a bill for the proceeds of such moiety against such joint owner

Remedies in equity against partners.

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| (1) 1 Salk. 392. 1 Show. 173. | 17 Ves. 201. |
| 2 Ld. Raym. 871. Dougl. 650. | (4) 17 Ves. 404. |
| 2 Bla. 947. 1 Ves. 239. 4 Ves. | (5) 3 Bos. & Pul. 288. |
| 396. 17 Ves. 201. 3 Bos. & Pul. | (6) Comb. 217. Dougl. 650. |
| 289. 1 East. 367. 2 Stark. 218. | (7) 3 Bos. & Pul. 254. |
| (2) 17 Ves. 407. | (8) 2 Atk. 510. 1 Mont. on |
| (3) Watson, 100. 4 Ves. 396. | Part. 80. 1 Ves. 416. |
| Cowp. 445. 3 Bos. & Pul. 289. | (9) Bunb. 107. |

and factor, it is not necessary to make the other joint owner a defendant (1).

Remedies in
case of death of
partner.

As between partners themselves and the representatives of the deceased partner, the same remedies as have been pointed out to be pursued whilst the partnership contract exists, will be found here applicable (2). When one or more partners having a joint legal interest in the contract dies, an action against third parties must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, neither can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract; and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered (3). In the case of a joint contract, if one of the parties die, his executor or administrator is at law discharged from liability, and the survivor alone can be sued (4), but in equity the executor of the deceased partner is liable, unless in some instances of a moiety (5), and if the contract were several, or joint and several, the executor of the deceased may be sued at law in a separate action (6); but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis* (7). When the surviving party dies, his executor or administrator is to be made defendant (8).

Remedies in case
of bankruptcy.

If one of several partners who have a joint cause of action become a bankrupt, the solvent partners must sue jointly with the assignees (9). If one of several contracting parties against

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| (1) 1 Ves. 417. 16 Ves. 321. | 1 Barn. & Ald. 31. 1 Chitty on |
| (2) Ante 262., see 3 Mer. 297. | Plead. 40.; and see 5 East, 261. |
| (3) 1 East, 497. Salk. 444. | (5) 2 Vern. 277. 3 Ves. 399. |
| Ld. Raym. 340. Com. Dig. Merchants, D. Vin. Abr. Partner, D. | 2 Ves. 106. Bac. Abr. Obligation, 7 vol. |
| 1 Show. 188. Comb. 474. Carth. 170. | (6) 2 Burr. 1190. |
| (4) 2 Marsh. Rep. 302. 6 Taunt. 587. Bac. Abr. Obligation, 5 vol. D 4. Vin. Abr. Obligation, B 20. Carth. 105. 2 Burr. 1196. Toller, 277. This rule is as to the personalty, but not as to the realty. 2 Saund. 51. n. 4. Tidd's Prac. 5 ed. 1074. | (7) Carth. 171. 2 Lev. 228. |
| | 2 Vin. Abr. 67. 70. |
| | (8) 3 Brod. & B. 302. 9 Co. 89 a. 3 Bla. Com. 302. 1 Com. on Contr. 528. 1 Barn. & Ald. 31. |
| | (9) 10 East, 418. 12 Mod. 446. 8 T. R. 140. |

whom there is a cause of action upon a joint contract, becomes bankrupt, the action must be brought jointly against the solvent partner and the bankrupt (1). There are few peculiarities to be remarked in proceedings in courts of equity where partners are either plaintiffs or defendants; in such cases the bill, answer, &c. are much the same as when there is only one individual on each side; all the parties, however, ought to sue and be sued, and a plea of want of parties goes both to discovery and relief where relief is prayed, though the want of parties is no objection to a bill for discovery merely. (2)

(1) 2 Maule & S. 23 444. (2) Mitford Pleadings, 220.
1 Wils. 89. As to liability of as- Bunb. 107. 2 Atk. 510. 16
signees of bankrupt, see post, tit. Ves. 321.
Bankruptcy.

CHAP. V.

Of Contracts of Manufacture, Sale, Warranty, Exchange, Loan, &c.

IN the preceding chapters we have considered the law relative to contracts in general, and how they are affected by the stamp acts, and by the intervention of agents, factors, brokers, and partners. In the present chapter we will consider a few of the principal contracts which are most frequently entered into between individuals, such as contracts of manufacture, sale, (its incident, warranty), exchange, and loan, and their incidents.

1. Contracts of manufacture.

With respect to contracts of MANUFACTURE, we in the last volume (1), in alphabetical order, examined the public regulations affecting each manufacturer and their servants, in general and in particular. We have now only to consider the law as it affects contracts between the manufacturer and third persons; of this description are all contracts by which any manufacturer is employed by another to construct a commodity not already made, and the latter engages to pay him a remuneration for so doing. This is the species of contract which in the civil law is described by the term *facio ut des* (2); contracts of this nature, we shall find, are in some respects governed by different rules to those affecting contracts of sale, and therefore they require distinct consideration.

A contract of manufacture need not, like a contract of sale, be reduced into writing, or be signed by the party to be charged therewith, as the statute against frauds only affects contracts of sale of goods (3). Therefore, where a person verbally bespoke a chariot, which he refused to take when it was made, it was held that the statute against frauds did not affect the bargain, which was a mere executory contract for the making of a commodity. So, when an agreement of manufacture is reduced into writing and signed, it must, if it exceed in value

(1) Ante vol. 2. ch. 13. p. 271 to 440.

(2) 1 Taunt. 320. 2 Blac. 445.

(3) 29 Car. 2. ch. 3. sect. 4.

£20, be stamped as an agreement, because the exemption in the stamp acts is only in favour of contracts for or relating to the sale of goods, and this is a contract of manufacture (1). However, to take the case out of the 17th section of the statute against frauds, the contract must be *bonâ fide* a bargain to *manufacture*, and for labour or carriage, which must form at least one of the principal ingredients of the bargain, and not for the mere sale of an article, though not then in existence; and therefore where a verbal contract was entered into by the plaintiffs, who were millers, for the sale of a quantity of flour, which at the time was not prepared, or in a state capable of immediate delivery, it was held that this was within the statute, as relating to the sale of goods (2). So if the contract is not to be completed within a year after it is made, or if it be intended to charge a surety, then, under the 4th section of the statute against frauds, it must be reduced into writing. (3)

In contracts of manufacture there is an implied warranty that the article shall be saleable, though in contracts of *sale* there must in general be an express warranty (4). If the article to be manufactured be not made pursuant to the contract, the party ordering it is not bound to accept or pay any thing for it; and it has been held, that where a builder undertakes a work, of specified dimensions and materials, and deviates from the specification, he cannot recover either upon the agreement or the *quantum volebant* (5). But if the party waive the objection, or accept the commodity in its incomplete shape, or encourage the manufacturer to proceed after he has broken the contract, then a fair remuneration for the work done is recoverable (6). If a party, entitled under a contract to receive a profit from another, by his own act so confounds the measure of that which he was to receive, that it can no longer be ascertained, he vacates his whole claim (7). In case of the sale of a distinct article, upon payment of the whole price, the property in general

(1) 3 East, 303.

(2) Garbutt v. Watson, 5 Barn. 108. 2 Campb. 391. 3 Campb. & Ald. 613. 2 Hen. Bla. 63. 286.

3 M. & S. 178. 4 M. & S. 262. (5) 3 Taunt. 52.

1 Taunt. 320. 6 Taunt. 11. (6) 1 Stark. 275. 6 Taunt.

4 Burr. 2101. 322. 1 Marsh. 581. 4 Taunt.

(3) 11 East, 142. 1 Barn. & 745. Peake, 103. Ante, 125.

Ald. 722.

(7) 2 Taunt. 150.

vests in the purchaser; but in case of a contract of manufacture it is otherwise, and if a person contract with another for a chattel, which is not in existence at the time of the contract, though he pays the whole value in advance, and the other proceeds to execute the order, the former acquires no property in the chattel till it is finished and delivered to him (1); unless the builder treats the other party as owner, as by enabling him to register in his own name a ship, which the builder was completing for him. (2)

II. Of contracts
of sale and pur-
chase.

An agreement for sale and purchase is a contract for the transmutation of property to another, in consideration of a sum of money actually paid, or intended to be so, by the vendee; and it belongs to that class of contracts, termed in the civil law *do ut des* (3); and when such a bargain is made for any specific commodity, set apart and not intermixed with other goods, the property is changed immediately upon the making of the contract, so that, upon tender of the price, the purchaser has a right to the delivery of that particular article (4); whereas in the case of a contract to manufacture an article, we have seen that until completed for delivery no property passes, although the manufacturer has received the full price of the article (5). But if the commodity sold be not finished, or be intermixed and not separated from the bulk, or if any thing, as measuring or weighing, remains to be done, then no property passes by the bargain till the article has been delivered (6). The property may be changed, though no actual delivery be made to, or possession be not obtained by the vendee, until the fulfilment of the stipulated terms (7); thus, if a man sell his horse for money, though he may keep him until he is paid, yet the property of the horse is, by the bargain, vested in the bargainor or buyer; so that if he presently tender the money to the seller, who refuses it, he may take the horse, or have an action of detinue or trover; and if the horse die in the vendor's stable between the bargain and the delivery, still he may have an action of debt for the money, because by the bar-

(1) 1 Taunt. 318. 2 Campb. Puffendorff, J. n. l. 5. c. 6. s. 2. 240. Ante, 126. (4) Com. Dig. tit. Biens, D. 3. 1 Taunt. 320.

(2) 5 Barn. & Ald. 942.

(5) Ante 271, 2.

(3) See Ross on Vendors and Purchasers, 1—4. Long on Personal Property, 1, 2. Comyn on Cont. 210. 2 Bla. Com. 446.

(6) 5 Taunt. 176. 617. 1 Marshall, 1. 2 M. & S. 397. Ante 126.

(7) Perk, § 92. Ross, 1.

gain the property was in the buyer (1). But although the property is bound by the bargain, yet, where part of the money only is paid by way of *earnest* (2), the property does not seem to be *absolutely* transferred; for if the party giving earnest neglect to complete the contract within a reasonable time after request made to him for that purpose, the bargain is dissolved, and the vendor may dispose of them (3). It was holden, that where A., having proposed to sell goods to B., gave him a certain time, at his request, to determine whether he would buy them or not, B. within the time determined to buy them, and gave notice thereof to A., yet A. was not liable to an action for not delivering them because B., was not bound by the original contract, and therefore there was no consideration to bind A. (4); but that doctrine has been considerably qualified by modern decisions, which establish, that if a proposed vendor engage by letter at a distance to give a time to a proposed purchaser, to decide on having a commodity at a named price, and the latter by letter agrees to the price within the time, the vendor is bound by the bargain (5). If, on an agreement for the purchase of goods, the vendee pay the whole price in advance, here the contract is executed by him, and executory by the vendor, and an indefeasible property in the thing sold vests in the vendee (6); and this virtual change of property may occur where the parties enter into a special contract or agreement, which, from its terms, allows the vendee to take immediate possession of the thing sold, and especially in those contracts where a day is appointed for the payment of the purchase money, and in these cases the contract is good immediately, and an action lies upon it by the vendee without payment, provided he be solvent (7); but in this case, to vest an absolute indefeasible property, the thing sold must have actually come to the hands of the vendee, for otherwise the vendor has a right to stop them *in transitu*, upon non-performance of the contract on the part of the vendee, or his insol-

(1) Noy's Max. c. 42. 7 East, Hob. 41. 10 Ed. 4. 10. Sed vide 3 Campb. 426.

(2) Whatever sum is given as earnest, or a deposit, is to be deemed part of the price, unless there is an express stipulation to the contrary. 1 Saund. 320. (4) 3 T. R. 653. (5) 16 East, 45. 1 M. & S. 21. 1 Barn. & Ald. 681.

(3) 1 Salk. 113. Bull. N. P. 50. 6 Mod. 162. Skin. 647. (6) 10 H. 7. 8 a. 14 H. 8. 20 a. Dyer, 30 a. Bro. Contract, 35. Kit. 181 a. Noy's Max. c. 42. 1 Taunt. 318. 1 Atk. 185. Ross, 3. 2 Com. on Cont. 213. (7) Dyer, 30 a.

vency (1). If credit be given by the vendor, as a voluntary act subsequent to and not making any part of the original contract, it may at any time be revoked (2); though if the vendor, being entitled to demand immediate payment, take a bill payable at a future day, he cannot commence an action for the original debt until that period expires, if that bill is a valid security. (3)

Conditional sales. It frequently happens, that sales are completed upon conditions which were entered into prior to the sale; thus, if an agreement be made for the sale of goods upon condition, namely, if he like or dislike them upon view, when he first has seen them, and agreed or disagreed, approved or disapproved of the goods, the bargain is then complete or void, though he afterwards disagree or agree to the contrary (4); but if the condition be, if he like or dislike the goods at such a day, if he declare his liking or dislike before the day, he may alter it at the day (5); so if cattle or goods are sold and delivered upon a contract that the vendee shall use them a certain time on trial, the vendee may retain them the whole time allowed, even though he should have expressed his dislike to them long previous to the expiration of the period allowed for trial (6). Goods are often delivered by one tradesman to another upon what is termed a contract of sale or return; this is a conditional contract for the payment of the price of the goods, unless the same be returned in a reasonable time (7); and until that has elapsed, the vendee has no absolute property in the goods, but only a qualified one as bailee (8); though, if he should become a bankrupt, if he was the reputed owner, the property will pass to the assignees. (9)

Form of contract of sale.

In general, no particular form is required by the law of England, for transferring property by way of sale from one person to another; this may be done, either by a formal written agree-

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| <p>(1) See post, as to stoppage in transitu.</p> <p>(2) 1 Esp. 430.</p> <p>(3) 1 Esp. 5.</p> <p>(4) Bro. Cont. 27. 1 Rol. Ab. 449. l. 22. Com. Dig. tit. Agreement, A. 4. Kit. 181. Co. Lit. 206 b. As to fulfilment and completion of these conditional sales, see 4 Campb. 251. 1 Barn. & Ald. 681. 16 East, 45. 4 Campb.</p> | <p>639. 2 Campb. 327. 5 Taunt. 556. 3 Campb. 92.</p> <p>(5) 1 Rol. Ab. 449. l. 25. Peake, 56. Noy's Max. c. 42. See 4 Barn. & Ald. 387.</p> <p>(6) 1 New Rep. 257.</p> <p>(7) Peake, 56.</p> <p>(8) Ross, 52, 3. Willes, 400. 2 Campb. 83. 2 Taunt. 176.</p> <p>(9) 2 Campb. 83. 2 Taunt. 176.; but see 8 Taunt. 76.</p> |
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ment between the parties, or by a mere verbal contract, subject indeed to such regulations as are required by several statutes, which have from time to time been passed by the legislature (1). The most important of these statutes are the statute against frauds and the registry acts; the acts regulating the sale of woollen and linen cloths; the sale of goods under a distress; the conveyance of bankrupt's property made by the commissioners to the assignees (2); and the sale of copy-rights, &c.; but we shall only inquire into the regulations laid down by the first two, as being most frequent in practice.

Before the passing of the statute 29 Car. 2. c. 3. s. 17. it was scarcely ever necessary that a mercantile contract should be in writing, unless in the case of bills of exchange; but so many frauds were found to originate, from the uncertainty in which the want of written evidence involved the transactions of the commercial world, and so many perjuries were committed, in order to sustain the crude and half-formed contracts of careless persons, that the evil at length attracted the notice and attention of the legislature, who thought it expedient that a certain class of contracts and agreements should be reduced into writing, and signed by the party to be charged therewith or his agent, and accordingly was passed this celebrated act, intituled "An Act for Prevention of Frauds and Perjuries," known by the name of the Statute of Frauds (3). There are only two sections of this act connected with mercantile contracts; viz. the 4th and 17th, to which we will for the present confine our attention. The words of the 4th section are as follows: "1st, That no action, shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; 2d, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; 3d, or to charge any person upon any agreement made upon consideration of marriage; 4th, or upon any

Of the statute
against frauds,
29 Car. 2. c. 3.
s. 17.

(1) See ante, 5, &c. as to the form of contracts in general. A bill of sale or lading is not a necessary instrument for the transfer of property in goods consigned to the purchaser, 5 Taunt. 74. And the property in a cargo may be transferred, without indorsement on bill of

lading. 5 Taunt. 558.

(2) 13 Eliz. c. 7. 1 Jac. 1. c. 15.

(3) As to the diversity of opinion among the judges and other learned and eminent persons on the general merit and utility of this act, see Roberts on Statute of Frauds, preface, xix to xxvii.

contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; and 5th, or upon any agreement that is not to be performed within the space of one year from the making thereof, *unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.*" The same construction prevails, in equity as at law, upon the statute against frauds; though, in equity, part performance of a parol contract will in some cases prevent a party from availing himself of that statute. (1)

Of agreements
not to be per-
formed in a year.

As to agreements not to be performed within a year from the time of making thereof.—The object of this clause is to repress perjury, and to guard against the setting up of supposititious contracts, by the imperfect recollection of witnesses, or by perjured testimony, after the lapse of a year (2). This clause, relating to every species of contract, only affects those which are executory, and where, by the express agreement of the party, the act is not to be performed within a year (3); and does not extend to such agreements which by possibility, and in the contemplation of the parties, may be performed within the year, though the contingency on which they depend does not in fact happen within the time (4); or to such agreements which do not appear upon the face of them as intended to be completed after a year. In deciding this distinction the whole tenor of the agreement and the intention of the parties must be considered. (5)

By the word "performed" in this clause the legislature meant a complete and not a partial performance. Hence, if it appear to have been the understanding of the parties to a contract at the time of entering into it, that it was not to be completed within a year, then although it might be, and in fact was performed within that time, it is within the clause, and cannot be enforced, unless it be put into writing (6). We now come to

(1) 1 New Rep. 176. 1 Ves. jun. 333. 1 Schol. & Lef. 130. 7 Ves. jun. 341. 11 East, 156.

(2) See 1 Lord Raym. 316, 17.

(3) 11 East, 155.

(4) 1 Salk. 280. Skinner, 353.

(5) Peter v. Compton, Skinner, 353. cited by Denison in Fenton

v. Emblen, 3 Burr. 1281. Fenton v. Emblen, 3 Burr. 1278. 1 Bla. Rep. 353. S. C. Smith v. Westall, Lord Raym. 316, 17. Fraucan v. Foster, Skin. 326.

(6) Bracegirdle v. Heald, 1 Barn. & Ald. 722. Boydell v. Drummond, 11 East, 142.

that part of the section requiring the agreement, or some memorandum or note thereof, to be in writing; for as there is some distinction between the requisite qualities of this instrument and that required upon contracts of sale, our inquiries into them both must be separate.

The words of this section are, that no action shall be brought in any of the cases therein enumerated, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. We have before considered what are the requisites and form of an agreement in general. (1) A strictly formal agreement is complete of itself, without the aid of other instruments to prove its completion; but there are agreements which are negotiated by correspondence in writing between the parties, and these have frequently given rise to questions whether they are within the meaning of the statute of frauds. It is now settled that a letter, if it specify or clearly ascertain the terms of the contract, is an agreement within the meaning of the statute (2); were it otherwise, the substance of the contract would be the subject of verbal testimony, in direct opposition to the statute of frauds (3). A letter ascertaining the terms of the agreement by reference to another document containing them (4), though even such document be not signed (5), or referring to something which is in itself certain, as to the custom of the country in an agreement for a lease (6), will satisfy the meaning of the statute. But parol evidence cannot be received to ascertain what is referred to, the subject of the reference not being sufficiently certain or decided, and distinct upon the face of the document itself (7). This rule, requiring certainty in the specification of the terms of the agreement, is not, in equity, construed with inflexible rigour; and where a curate covenanted to build a house on the glebe land, without specifying the time when it

Of the nature of and what constitutes a written agreement.

(1) Ante, pages 2 & 3, &c.

(2) See the late case of *Kennedy v. Lee*, 3 Merivale, 441. *Seagood v. Meale*, Pr. Ch. 560. *Clerk v. Wright*, 1 Atk. 12. *Whaley v. Bagenal*, 6 Bro. P. C. 45. *Eq. Ca. Ab.* 49. 2 Vern. 322.; and see *Morris v. Stacey*, Holt, C.N.P. 153. 1 Ves. 297.

(3) *Roberts*, 106.

(4) 3 Atk. 503. *Saunderson v. Jackson*, 2 Bos. & Pul. 238.

(5) *Tawney v. Crowther*, 3 Bro. P. C. 318.

(6) 1 Ves. jun. 330.

(7) *Brodie v. Paul*, 1 Ves. jun. 326.

should be built, nor what sort of a house it was to be, the Lord Chancellor observed, that as it was designed for the benefit of the church, and it could be specifically performed, it ought, and he decreed a convenient house to be built (1). It is not necessary that the letter, if it state specifically the terms of the agreement, should pass between the parties to the contract. If it be written and signed by the party to be charged by the agreement, it will sometimes be sufficient, even though written to a third party (2). But this appears to be only in cases where it is written for the direct purpose of executing the treaty, as where a man writes to his agent, desiring him to fulfil it; and not in cases where the communication is made as a mere matter of intelligence (3). Instructions to counsel to prepare writings cannot be received as evidence of an agreement within the statute of frauds; for after the writings are drawn and engrossed, either party may refuse to execute them (4). However, if an instrument has been designed for a complete deed, but is deprived of its specific operation by the omission of circumstances requisite to its validity as a deed, or by a change in the relative situation of the parties, it will be received in equity as an agreement, or as evidence of an agreement (5). With respect to particulars of sale, it has been well observed, that the courts do not incline to consider a particular, or list of articles proposed for sale, as an agreement within the statute, unless it have an additional weight or a new character imparted to it by the adoption and confirmation of the parties; and moreover, certain terms and stipulations as to quantity, description, and price, sufficient to render it convertible into a contract, by the proper authentication of it as such. A particular of sale (6) usually indeed carries upon the face of it nothing more than the assent and privity of *one* of the parties; to be effectual, an agreement, of whatever description, ought to import the privity and consent of *both*, and therefore a mere entry in a steward's book of contracts with the tenants was not allowed to be evidence in itself of an agreement for a lease

(1) *Allen v. Harding*, 2 Eq. Ca. 17. *Morris v. Stacey*, Holt, C. N. P., and *Bateman v. Phillips*, 15 East.

(2) 15 East, 272.

(3) *Welford v. Beazeley*, 3 Atk. 503. *Ayliffe v. Tracey*, 2 P. Wms. 64. *Seagood v. Meale*, Pr. Ch. 560. *Roberts*, 106.

(4) Per Ld. Ch. Parker in *Montacute v. Maxwell*, 1 P. Wms. 619.

(5) *Cannel v. Buckley*, 2 P. Wms. 242.

(6) *Cass v. Waterhouse*, Pr. Ch. 29. *Law v. Barber*, Anstr. 425. *Cooke v. Tombs*, Aust. 420.

between a lord and tenant (1). So a mere proposal in writing to pay the debt of another is not binding, unless the creditor accede thereto in writing. (2)

It is not only necessary to take a case out of the statute that the terms of the agreement be set forth, but it is also indispensable that the *consideration* upon which it is supported as a good agreement at common law, should appear in writing on the face of the agreement (3); it being held that the consideration is a part of the agreement, and that an instrument cannot be deemed an agreement such as the statute requires, when only a part of the thing agreed is set forth (4). However the courts are not very strict as to the terms in which the consideration is expressed, so that it but appear sufficiently on the face of the writing. (5)

With respect to the *signature* to the agreement, which is required by the statute, it is necessary that the party should actually sign his name, and the mere identification of his handwriting on the agreement will not suffice; and this was so held even where the party wrote all the agreement himself, but did not sign it (6). But, as we have before seen, the identical agreement itself need not be signed; for if a letter contains all the terms, and describes the consideration and all the circumstances, or refers to the agreement, so that by the contents of the letter it can be connected and identified with the agreement, that letter, which not only is not a signature, but is the last of all things that can be called a signing the agreement, is a writing signed, which

(1) *Charlewood v. Duke of Bedford*, 1 Atk. 497.

(2) *Gaunt v. Hill*, 1 Stark. 10. See 1 M. & S. 557.

(3) An "agreement" is not synonymous with "promise." *Johnson's Dict. tit. Agreement*.

(4) *Wain v. Walters*, 5 East, 10. *Sheppard, Touchstone*, 85. Though the validity of the decision in *Wain v. Walters* has been much questioned and disputed, it is now finally established by the case of *Saunders v. Wakefield*, 4 Barn. & Ald. 595.; and see *Atkinson v. Carter*, argued after Mich. Term, 1821, acc. *Phillipps v. Bateman*, 16 East, 370. Ex-

parte *Minet*, 14 Ves. 190. Ex parte *Gardiner*, 15 Ves. 286. *Stadt v. Lill*, 9 East, 348. *Fowle v. Freeman*, 9 Ves. 351. *Cotton v. Lee*, 2 Bro. C. Rep. 564. *Egerton v. Matthews*, 6 East, 307. *Goodman v. Chase*, 1 Barn. & Ald. 300.

(5) *Stadt v. Lill*, 9 East, 348. *Morris v. Stacey*, Holt, C.N.P. 153. *Bateman v. Phillips*, 15 East, 272.

(6) *Selby v. Selby*, 3 Mer. 2. *Ithell v. Potter*, cited in *Hawkins v. Holmes*, 1 P. Wms. 770, 1. *Bawdes v. Amburst*, Pr. Ch. 402. *Stokes v. Moore*, 1 Cox, P. Wms. 771.

ascertaining the contents of the agreement, amounts to a note or memorandum of it, and therefore satisfies the statute (1). It should seem that the mark of a marksman, or the printed name of a party, where a man has been in the habit of printing instead of writing his name, or signing the initials of a name (2), is sufficient; and on this ground a tradesman's bill of parcels, in which the vendor's name was printed, and the purchaser's name written by the vendor, was there deemed to be, though not the contract itself, yet a sufficient note or memorandum in writing of the contract signed by the party (3). It was once a question, whether sealing was not a sufficient signing, but it is now decided it is not (4). A party signing an agreement as a witness, with the knowledge of its contents, which concerned her and her only to perform, is considered as a sufficient acknowledgment and adoption of the agreement to bring it within the statute (5), and parol evidence may be adduced of the parties knowledge of the contents of the agreement.

Signature of both parties.

It was formerly thought necessary that both parties should sign the agreement, but it is now sufficient that the party only to be charged should sign (6), though the name of both parties should appear on the agreement (7); and where a bill is filed for a specific performance of an agreement, signed only by the defendant, the plaintiff acquiesces, by his application for relief, in all the terms of the instrument which are required to be performed by him (8); the mere proposition to enter into an agreement to pay the debt of another must be acceded to by the other party by note in writing. (9)

The PLACE where the *signature* is made is not of any essential importance, and if the name is inserted any where it is suf-

(1) Per Lord Chancellor in *Coles v. Trecothick*, 9 Ves. 250. *Welford v. Beazeley*, 3 Atk. 503. *Kennedy v. Lee*, 3 Mer. 441. 2 Bos. & Pul. 238.

(2) *Phillimore v. Barry*, 1 Camp. 513.

(3) *Saunderson v. Jackson*, 2 Bos. & Pul. 238. *Roberts*, 125. *Schneider v. Morris*, 2 M. & S. 286.

(4) *Shepp. Touch.* 60. c. 4. No. 5.

(5) *Welford v. Beazeley*, 1 Ves.

6. 1 Wils. 118. S. C. *Roberts*, 123.

(6) *Whitchurch v. Biers*, 2 Bro. C. C. 564. *Hatton v. Grey*, 2 Cha. Ca. 164. *Roberts*, 124.

(7) *Champion v. Plummer*, 1 New Rep. 252. * *Cooper v. Smith*, 15 East, 103. *Egerton v. Matthews*, 6 East, 307.

(8) *Owen v. Davies*, 1 Ves. 82.

(9) *Gaunt v. Hill*, 1 Stark. 10. 1 M. & S. 557. *Symmons v. Want*, 2 Stark. 371.

ficient, provided it is inserted with a view to give authenticity to the whole instrument, and not as applicable to particular purposes; and a will, commencing thus, I A. B. of, &c. do make this my last will, &c., and omitting to subscribe the name, was held sufficiently signed (1). So a letter, commencing, Mr. F. presents his compliments, &c. was held sufficient (2). An auctioneer's writing down, Mr. Stokes, in his book, as the purchaser, is sufficient (3). Nor does it make any difference, if a party who has written his own agreement, beginning it with, I A. B., &c. leave a place at the bottom for his signature, and neglect to subscribe his name. (4)

With respect to the question, who may be considered as an agent within the meaning of this statute? we shall find that it is governed by the same rules as those existing at common law; and that, when a third party constituted as agent acts within the scope of his authority committed to them, his principal is equally bound by the acts of such agent as by his own. However, as there are a few decisions peculiarly relating to the question, who is an agent within the statute? we will here enumerate them. Sales transacted by the intervention of auctioneers or brokers are within the statute, and the auctioneer or broker is an agent of both parties; therefore any memorandum made by either of a bargain is a sufficient compliance with the terms of the statute to make the contract of sale binding on each. (5) The agent must be some third person, and one of the contracting parties cannot be considered as the authorized agent of the other; and where a vendor wrote the contract, under the dictation of the vendee, it was decided he was not an authorized agent within the statute (6). The statute does not exclude parol evidence of a party being an agent, when he signs an agreement or memorandum generally, and not as agent. (7)

Of the signature
by agent.

(1) *Levayne v. Stanley*, 3 Lev. 1. *Hilton v. King*, 3 Lev. 86.

(2) *Ogilvie v. Foljambe*, 3 Mer. 53.

(3) *Stokes v. Moore*, 1 Cox, 219. *Id.* 771. note; and see *Selby v. Selby*, 3 Mer. 5. *Ogilvie v. Foljambe*, 3 Mer. 53. *Knight v. Crockford*, 1 Esp. N.P.C. 190.

(4) *Saunderson v. Jackson*, 2 Bos. & Pul. 238. *Fowle v. Freeman*, 9 Ves. 351.

(5) 1 Bla. 599. 3 Burr. 1921. 2 Taunt. 38. 1 Jac. & W. 350. The auctioneers' clerks are not, unless authorized, sufficient agents, 9 Ves. 235.

(6) *Wright v. Dannah*, 2 Campb. N. P. C. 203. *Cooper v. Smith*, 15 East, 103. 5 Barn. & Ald. 333.

(7) *Wilson v. Hart*, 7 Taunt. 295.; and cases there cited.

As to what acts of the agent are binding upon the principal, within this statute, it has been held, that a memorandum made by the vendor's broker, with the bought and sold notes copied therefrom, and delivered to and accepted by each party, will bind both (1). It is the duty of the broker thus transacting the bargain for the vendor and the purchaser, to sign the contract in his book as soon as possible after the bargain, and afterwards to forward the sale and bought notes to the parties; and if the broker vary at all from the authority given to him by either of the parties, the memorandum will be void *in toto* (2). If the agent of the vendor is entrusted by both parties with the drawing up of the terms of the contract, his signature will bind the vendee (3). And where A. is instructed by B. and C. to act as their broker, in a treaty for the purchase and sale of sumach, B. afterwards tells A. that he has concluded the bargain, and directs him to prepare the bought and sold notes, which are forwarded to the parties accordingly; C. does not return the note, but in the course of two days expressed his regret at having sold the sumach; it was held that A.'s authority continued down to the time of his executing the agreement (4). And where the defendants employed an agent to purchase prize goods, and the auctioneer wrote the agent's initials, with the prices in the printed catalogue, against the lots sold to him, the defendants afterwards wrote to their agent, recognizing the purchase; and it was held that the entry in the catalogue, coupled with the defendants' letter, constituted a sufficient memorandum within the statute. (5)

Authority of
agent.

The last consideration on this branch of the statute is as to the manner in which the agent is to be appointed. This authority need not be in writing, and a parol one is sufficient (6); and it need not be given with a view to a particular transaction,

(1) See ante, chap. 3. *Rucher v. Cammeyer*, 1 Esp. 105. *Hinde v. Whitehouse*, 7 East, 599. 69. 3 Smith, 528. 36. S. C.; and see *Dickenson v. Lelwal*, 1 Stark. 128. *Simon v. Metivier*, 1 Bla. 599. 3 Burr. 1921. *Cooper v. Smith*, 15 East, 105. 8. *Blagden v. Bradbear*, 12 Ves. 466. *Buckmaster v. Harross*, 13 Ves. 456. 72, 3. 6 Ves. 782. 8 Ves. 250.

(2) Per Abbott, C.J. in *Obricn*

v. Coates, at Guildhall, Jan. 1823.; and see 2 Campb. 339. Ante, 224.

(3) *Hicks v. Hankin*, 4 Esp. 114.

(4) *Chapman v. Partridge*, 5 Esp. 256. Ante, 223, 4.

(5) *Phillimore v. Barry*, 1 Camp. 513. *Allen v. Burnett*, 3 Taunt. 169.

(6) See ante, 194. Per Kenyon, in *Rucher v. Cammeyer*, 1 Esp. N. P. C. 106; see also *Emmerson*

but generally to transact any business for the principal (1). We have seen that an auctioneer is considered the agent of both parties; but his clerks have not, in general, authority to act as agents for his employers (2). This authority may be revoked at any time pending the contract, and before a memorandum or note thereof is signed. (3)

We will now proceed to observe upon the 17th section of the statute of frauds, 29 Car. 2. chap. 3., which enacts, that “no contract for the sale of any goods, wares, and merchandizes for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something *in earnest*, to bind the bargain, or in part payment, or that some *note or memorandum in writing* of the said bargain be made and *signed* by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” SALE OF GOODS.

We will first enquire, what *contracts* are within the meaning of this branch of the statute? A distinction was formerly taken, and apparently sanctioned by the courts, between contracts executed and contracts executory. Where the contract for the sale of goods was executed, that is to say, where every thing preliminary to the transfer was actually performed and finished, and it remained only for the buyer to take possession of his purchase, there the contract was considered as executed, and constituting a sale within the meaning of the statute, such contract must necessarily be in writing; but where the seller had something further to do, something independent of, and previous to the mere delivery of the goods purchased, there the contract was considered as executory, exempt from the operation of the clause, and requiring no written voucher (4). This distinction is now clearly overthrown, and the statute extends itself to contracts executory, as well as to such as are capable of being completed immediately (5). Still, however, these executory contracts must be What contracts within 17th sect.

v. Heelis, 2 Taunt. 46. Per Lord Eldon in Coles v. Trecothick, 9 Ves. jun. 250. Chapman v. Partridge, 5 Esp. N. P. C. 256. Rob. 113. n. 54.

(1) Anon. Loft. 332.

(2) Coles v. Trecothick, 9 Ves. 234.

(3) Farmer v. Robinson, 2 Camp. 339. note, ante, 224.

(4) Towers v. Sir J. Osborne, Stra. 506. Clayton v. Andrews, 4 Burr. 2101. Alexandr v. Comber, 1 Hen. Bla. 20.

(5) Rondeau v. Wyatt, 2 Hen. Bla. 63. Cooper v. Elston, 7 T. R. 14.

such, as at the time of entering into the same they might if required be immediately fulfilled, and not where something is to be done, which forms an ingredient in the contract, previous to the completion of the sale, as those contracts for making and delivering goods where work and labour is to be previously bestowed upon them, and materials and necessary things to be found; as where the plaintiff was to build a chariot for the defendant (1); or where the agreement was to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be thrashed before the delivery (2). Where however an additional price was agreed to be paid by the buyer to the seller for goods, on account of the seller undertaking to deliver them to the buyer at a considerable distance from the place of sale, but no separate charge was made for the delivery, the case was held within the statute (3); and the question to decide whether the case comes within the statute must always be, whether the contract is really for the sale of goods, or for work and labour, and materials found? And where a verbal contract was entered into by the plaintiffs, who were millers, for the sale of a quantity of flour, which at the time was not prepared and in a state of immediate delivery, it was held that this was a contract for the sale of goods within the statute. (4)

What are goods,
wares, and mer-
chandizes.

The next point which demands our attention is the phrase, *goods, wares, and merchandizes*; some doubts upon those words have arisen with respect to funded property, which has sometimes been regarded as goods within the meaning of the statute, and sometimes considered as exempt from its operation. The question can hardly be considered as decided, though upon the strength of the words, accept and receive, the more favourable opinion seems to be, that only corporeal and tangible things are the subjects of contract within the statute; and that, therefore, the sale of stock, or of the shares in a public undertaking, need not be in writing (5). Much discussion too has arisen respecting the

(1) *Towers v. Osborne*, Stra. 506.; see also *Rondeau v. Wyatt*, 2 Hen. Bla. 63. *Groves v. Buck*, 3 M. & S. 178.; but see 4 M. & S. 262. and ante, 271.

(2) *Clayton v. Andrews*, 4 Burr. 2101. 2 Hen. Bla. 63. *Chater v. Beckett*, 7 T. R. 201. *Cook v.*

Tombs, Austr. 420. 3 Burr. 1921. 3 Bro. P. C. 154. Sed vide 4 M. & S. 262.

(3) *Astey v. Emery*, 4 M. & S. 262.

(4) *Garbutt v. Watson*, 5 Barn. & Ald. 613.

(5) *Pickering v. Appleby*, Com.

applicability of these words to *crops* not at the time of making the contract severed from the land. The result of the opinions on this subject is, that such crops in general may be considered as goods, &c. within the clause, when they are arrived at maturity, and are to be taken out of the ground directly; for then the land is a mere warehouse for the crop, during the very short interval between the contract and the removal; and any advantage which the crop may derive from the soil is merely accidental, and constitutes no part of the consideration (1). The sale by a landlord to his tenant, of his share in the crops which he would be entitled to when reaped, is a sale within this clause (2). On the other hand, when by the express or implied terms of the contract the crops are to remain growing on the land till they arrive at a sufficient maturity, or any other time, they are considered as connected with the land, and continue to derive hourly increase from the nourishment which it affords, and consequently are not within the 17th section (3). In the former case, the purchaser of the crop has no interest in the land, as he has in the latter. However, where a purchaser has such interest in the land, though the case does not fall within this clause, it is affected by the 4th section of the same statute; but as this relates only to real property, we will not here examine it.

The next question on this clause is as to what will amount to a sufficient *acceptance* by the buyer of part of the goods sold. To complete this acceptance, the contract of sale must be perfect, and there can be no acceptance, or actual receipt by the buyer, unless there be a change of possession; and unless the seller divests himself of the goods, though but for a moment, the property remains in him (4). An *actual* delivery by the seller, and acceptance by the buyer, is not necessary in all cases, though in

As to what amounts to acceptance of goods.

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354. *Colt v. Netterville*, 2 P.Wms. 362. *Warwick v. Bruce*, 2 M. & S. 307. *Latham v. Barber*, 6 Term 205.
 Rep. 67. acc. *Mussell v. Cook*, (2) *Poulter v. Killingbeck*, 1 Bos. Pr. Ch. 533. *Cruce v. Dodson*, & Pul. 397.
Select Cases in Chancery, 41. Trin. (3) *Crosby v. Wadsworth*, 6 East, 11 Geo. 3. con.; and see observations and arguments on this point in *Roberts' Statute of Frauds*, 602. *Emmerson v. Heeles*, 2 Taunt. 184. *Long on Personal Property*, 38. *Warwick v. Bruce*, 2 M. & S. 205. *Seal v. Anty*, 2 Brod. & B. 99.
 56, 7. (4) See *Tempest v. Fitzgerald*, 3 Barn. & Ald. 683. *Carter v. Toussaint*, 5 Barn. & Ald. 859.
 (1) *Park v. Staniland*, 11 East,

effect the law presumes one. As we have before seen (1), where goods are ponderous and incapable of being handed over from one to another, the delivery need not be actual, but may be made by that which is tantamount, as by the delivery of the key belonging to the warehouse in which the goods are deposited, or by a delivery of other tokens of property (2). And where goods are sold by sample which is part of the bulk, and the sample is delivered to the purchaser, it is a part delivery within the statute (3); but it is otherwise if the sample is not part of the bulk (4). This acceptance need not be in express terms, but may arise constructively out of the acts of the vendee, whereby he impliedly considers or treats the bargain as complete; as where the plaintiff, who kept a livery stable, sold horses to the defendant, and the defendant, having no stables of his own, desired the seller to incur expence in keeping them at livery (5). So the payment of warehouse rent by the purchaser amounts to a delivery (6). So the delivery of an order by the seller to a wharfinger or warehouseman in whose custody the goods are, to deliver them to the vendee, is sufficient to satisfy the statute (7), and bind the seller; and that whether a transfer is made in the wharfinger's books or not (8). And where the purchaser, with or without the privity or approbation of the vendor, exercises any acts of ownership over the goods sold, this is sufficient evidence of a delivery, though the local situation of the goods is not changed; as where, after a bargain and sale of a stack of hay between the parties on the spot, it appeared that the vendee had resold, and that the second vendee, though without the knowledge or consent of the original vendee, had taken away part of the hay, it was held that this was sufficient evidence of a delivery to and acceptance by the first vendee (9). So if a purchaser write his name or initials upon a particular article bought, it is sufficient to take the case out of the statute; but this signature will not amount to a delivery of other articles bought at the same

(1) Ante, 120, &c. as to delivery in general. 458. This decision was doubted by Bayley, J. in 3 Barn. & Ald. 324.

(2) 1 Atk. 170. 1 East, 194. (6) Hurry v. Mangles, 1 Camp. Rep. 452.

(3) Klinitz v. Surry, 5 Esp. 267. (7) Searle v. Keeves, 2 Esp. N. P. C. 598.

(4) Cooper v. Elston, 7 Term Rep. 14. (8) Harman v. Anderson, 2 Campb. 245.

(5) Talver v. West, Holt's N. P. 179. (9) Chaplin v. Rogers, 1 East,

(5), Elmore v. Stone, 1 Taunt. 191.

time (1). And where in an action for non-delivery of wine, it appeared the plaintiff went into defendant's cellar, and having bargained for the sale of several pipes, the spills or pegs of the casks were cut off, and the plaintiff's name written thereon, this was held as amounting to a delivery (2). * With respect to the admission of a party of the sale, as evidence, to render the bargain complete within the statute, it is a question whether an offer by a person who has contracted for the purchase of goods, to resell them as his own, is proof of a delivery within the statute. (3)

It has been held, that the shipping of goods in the same manner as in previous dealings is an acceptance and actual receipt by the purchaser within the statute of frauds, and where the purchaser gives written orders to send the goods bought by a particular carrier, the delivery to that carrier takes the case out of the statute (4); but in a recent case, it was held, that if a merchant in London, who had been in the habit of sending goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship, delivers goods in the same manner to the wharfinger to be forwarded in the usual manner, and they were lost, this was not an acceptance by the buyer, and he was protected from liability by the statute against frauds (5). The price of any commodity is one entire thing, and cannot be divided into so many payments as there might be considerations included in the price; and where an additional price was agreed to be paid by the buyer to the seller for goods, on account of the seller undertaking to deliver them to the buyer at a considerable distance from the place of sale, but no separate charge was made for the delivery, the case was held within the statute (6). Where an agreement was entered into for the sale of goods, which were to be delivered at different times, and the defendant accepted one part of the goods, but requested the plaintiff not to press the delivery of the residue, to which he assented, and the defendant afterwards refused to accept the residue, on the ground that the

(1) *Hodgson v. Le Bret*, 1 Camp. 598. *Astey v. Emery*, 4 M. & S. 233. 262.

(2) *Anderson v. Scott*, 1 Campb. 235 n. (4) *Hart v. Sattley*, 3 Campb. 528.

(3) *Blenkinsop v. Clayton*, 7 Taunt. 597. 1 Moore, S. C. See (5) 5 Barn. & Ald. 557. *Searle v. Reeves*, 2 Esp. N. P. C. 262. (6) *Astey v. Emery*, 4 M. & S.

alteration of the agreement as to the times of the delivery rendered it void by the statute of frauds, there being neither a part acceptance of, nor a part payment for the residue, the court held the objection of no avail, as the understanding between the parties merely dispensed with the terms of the original contract as to the delivery, and therefore that it was not affected by the statute (1). But the understanding and contract of the parties must govern the construction of this part of the statute; and the mere circumstance of exercising acts of ownership, or of a delivery, will be of no avail, unless it be consistent with the terms and construction of the bargain. And where A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon, before the expiration of which time A. rode him, &c., the horse died before A. paid the price or took it away, it was held that there was no acceptance of the horse within the meaning of the statute (2). So where a horse was sold by verbal contract, but no time was fixed for payment of the price, and the horse was to remain with the vendor for twenty days, without any charge to the vendee, and at the expiration of that time the horse was sent to grass by the direction of the buyer, and by his desire entered as the horse of one of the vendors, it was held that there was no acceptance of the horse by the vendee, to take the case out of the statute (3). And where a vendee verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares, (then in vendor's possession, constituting part of a larger quantity in bulk), to remain in vendor's possession till called for, and the agent on his return home measured the twelve bushels, and set them apart for the vendee, it was held that this did not amount to an acceptance within the statute, as it was clear he had a right to make any objection to their quality at the time when they should be tendered to him for acceptance (4). And this acceptance by the vendee must be such as completely affirms the contract, and with a view to the performance of it; and there can be no actual acceptance, so long as the buyer continues to have a right to object, either to the quantum or quality of the goods. And where the plaintiff, in consequence of a verbal order, had sent to defendant a bale of sponge, which the defendant, disliking its quality, had returned,

(1) *Cuff v. Penn*, 1 M. & S. 21.(3) *Carter v. Toussaint*, 5 Barn.(2) *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680.

& Ald. 854.

(4) *Howe v. Palmer*, 3 Barn. & Ald. 321. 5 Barn. & Ald. 559.

and wrote a letter to vendor, that it was not such as that agreed to be purchased, or sent in due time, or that the invoice was not forwarded, but not stating in the letter the terms of the bargain, it was held this did not amount to an acceptance. (1)

However, it seems clear, that if there has been a delivery, by the vendor, in pursuance of a verbal sale, he has lost the power of retraction under cover of the statute, if the vendee chuse to treat the contract as complete; thus, in all those cases where the law would regard the goods as vested in a consignee or vendee absolutely as against both parties, where such goods had been sent in execution of a written order, it should seem that such delivery would be perfect and conclusive against the consignor or vendor under a verbal contract, because the contract is then executed on his part, so as to enable the buyer or consignee to say the contract was complete, by testifying in any manner his own consent or acceptance. (2)

As to what amounts to sufficient *earnest*, Mr. Justice Blackstone says, "that if any part of the price is paid down, if it is but a penny, or any portion of the goods is delivered by way of earnest, it is binding (3)." It should be observed, that the statute says, that *something* be given in earnest, and therefore either money or a ring, a glove, or as was the custom of the Jews, a shoe, given in earnest of a bargain, and so expressed at the time, would be equally binding (4). To constitute earnest, the thing must be given as a token of ratification of the contract, and this must be determined by the destination expressly given to it by the person giving, for *quidquid solvitur, solvitur ad modum solventis* (5), and he should declare, at the time of giving the thing, on what account he gives it. (6)

EARNEST AND
PART PAY-
MENT.

As to what is part payment of the sum contracted to be given for the goods sold, the doctrine with regard to the giving of earnest here again applies, and the payment of the money must

(1) Kent v. Huskinson, 3 Bos. & Pul. 232. 15 East, 103.; and see 5 Barn. & Ald. 559.

(2) Roberts on Statute of Frauds, 178. See also Harman v. Anderson, 2 Campb. Rep. 245.

(3) 2 Bla. Com. 447.

(4) See Ross on Vend. & P. 15.

(5) Penniel's case, 5 Co. Rep.

117.

(6) Manning v. Western, 2 Vern. 606.; and see 2 Esp. N.P.C. 666.

be expressly with the intent to ratify the bargain. The payment must be real, and no form will dispense with it; as where the purchaser of goods drew the edge of a shilling over the hand of the vendor, and returned the money into his own pocket, which, in the north of England, is called the striking off a bargain; this is not a part payment within the statute. (1)

With regard to the effect of the acceptance of part of the goods sold, or giving of earnest, or a part payment of the purchase money, it is to be observed, that notwithstanding any of these circumstances, the absolute right to the immediate possession is not so transferred as that the buyer may take away the goods without paying or tendering the price agreed upon, for they only bind the bargain, and give a party a right of demand, which demand, without the payment of the money, is void, unless by the terms of the contract credit was to be given. But after these circumstances, the seller cannot dispose of the goods without a default on the buyer's part; and therefore if the buyer does not come and pay and take the goods, the seller ought to request him; and if after that, the buyer does not take them in reasonable time, the agreement is dissolved, and the seller is at liberty to resell them to any other person. (2)

Of the note or memorandum.

With respect to the words "except some *note* or *memorandum* of the *bargain* be made and *signed* by the parties to be charged therewith, or their agents thereunto lawfully authorized," it is to be remarked, that the words of this section are not so strict as those of the 4th section; the words of the latter providing that no action shall be brought on the dealings specified in that section, unless the *agreement*, or some note or memorandum *thereof*, shall be in writing, &c., while the words of the 17th section omit the word *agreement* altogether. On this ground it has been held, that the object of the 17th section differed from that of the 4th section, in which the word *agreement* is introduced; and that the words of this part of the 17th section were satisfied, if there were some note or memorandum in writing of the terms of the bargain, signed by the parties to be charged by such con-

(1) *Blenkinsop v. Clayton*, 7 Taunt. 597. 1 Moore, 328. S. C. In the body of the report in Taunton, it appears that the shilling was produced by the seller and re-

turned to his own pocket. But this seems to be a mistake.

(2) *Langfort v. Administratrix of Tiler*, 1 Salk. 113.; but see 3 Campb. 426.

tract, and that the consideration need not be expressed therein (1); the names of both parties should appear in the memorandum, or some paper signed by the defendant relating to it, though the party to be charged need only sign it (2); but two separate writings may be connected together, to form a sufficient note or memorandum within the statute, as a printed bill of parcels delivered by the vendor to the vendee at the time of the sale, and a subsequent letter, written and signed by the vendee, and referring to and not disputing the sale (3). In like manner an order for goods, written and signed by the agent of the seller in a book of the buyer, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming performance of the order, as to constitute a complete contract within the statute (4). But a memorandum of sale, made by the seller's order, but without any signature of the party to be charged, does not take a case out of the statute. (5) The memorandum of a broker, who is agent for both parties, in his book, signed by him, is sufficient, without any bought and sold notes being sent to the parties (6); *a fortiori* where such notes are sent (7). If the buyer should come after the sale, and intermeddle with the goods so as to constitute an acceptance of the same on his part, or pay any deposit or earnest, it would take the case out of the statute. (8)

The observations as to the nature of the agreement or memorandum, and the requisite signature thereto under the 4th section of the statute, will for the most part be found here applicable. (9)

(1) *Egerton v. Matthews*, 6 East, 307.

(2) *Champion v. Plumer*, 1 New Rep. 252. *Cooper v. Smith*, 15 East, 103. 3 Taunt. 169.

(3) 2 Bos. & Pul. 238. 3 Esp. 180. 3 Taunt. 169. 15 East, 103.

(4) 3 Taunt. 169. 15 East, 103. As to forming agreements by letters within the meaning of this statute see ante, 277, &c.

(5) 15 East, 103.

(6) *Heyman v. Neale*, 2 Camp. N. P. C. 337.; sed quære, each is

bound by the note which the broker delivers, and if different notes are given to the parties, how can they understand each other? See per Gibbs, Ch. J. *Holt*, C. N. P. 172.

(7) *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105. Per Lord Ellenborough, in *Hinde v. Whitehouse*, 7 East, 569. and 1 Stark. 128. As to alteration of notes by broker as agent for both parties, see post.

(8) See 3 Burr. 1921. *Roberts*, 112.

(9) See ante, 276 to 283.

Sales by auction.

It seems to have been doubted, whether sales by auction were within the regulations of this statute for preventing frauds and perjuries, because the solemnity of that kind of sale, and the multitude of the persons present, precluded all perjury as to the fact of sale (1), and the older decisions seem to support that opinion. But Lord Ellenborough, in the case of *Hinde v. Whitehouse* (2), throws some light on the question, and was inclined to think they were within the statute, observing, "that if once we got loose from the positive words of the statute, it would become a question only of the quantum and degree of danger of perjury, in every particular instance, which would open a door to an indefinite mode of construction, founded on all the varying circumstances of the time, and frequency of persons attending the place of sale, and the like, and which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world, who are governed by it." From this opinion, it will appear that they fall within the statute. At all events, however, the auctioneer is the agent for both the buyer and seller, and a memorandum or agreement, made by or entered into with him, is sufficient to bind both parties (3). It is always necessary, therefore, to take

(1) See opinions of Lord Mansfield and Mr. Justice Wilmot on this question, in *Simon v. Metivier*, 3 Burr. 1921. 1 Bla. 599.; and *Stansfield v. Johnson*, 1 Esp. N. P. C. 107.; *Roberts*, 112. acc. *Hinde v. Whitehouse*, 7 East, 558.; and observations of Sir W. Grant, M. R. in *Blagden v. Bradbear*, 12 Ves. 472.; also dictum of Lord Loughborough in *Rondeau v. Wyatt*, 2 Hen. Bla. 63. where he says, "that the above argument assumes that the only object of the statute was to prevent the committing of perjury, which, though a principal object, was not the sole one; and the object was to lay down a clear and positive rule to determine when the contract of sale should be complete;" also the case of *Walker v. Constable*, 1 Bos. & Pul. 306. *Buckmaster v. Harrop*, 13 Ves. 456. *Emmerson v. Heelis*, 2 Taunt. 38. As to sales by auction of land being within the statute, see the

treatises and opinions, Long, p. 37. and Ross, 20. An estate, however, purchased at a bidding before a master of the court of chancery, is certainly out of the statute, and the purchase would be enforced though not subscribed by the bidder, after confirmation by the master's report. Per Lord Hardwicke, *Attorney General v. Day*, 1 Ves. 221. And a verbal agreement between the solicitors of a mortgagor and mortgagee, the latter of whom had filed a bill for a foreclosure, and for the sale of the estate, and payment of the principal debt, interest, and costs, was permitted to be established by evidence, as not being within the purview of the statute. 3 Bro. C. P. 334. *Cox v. Peele*, on appeal from the rolls. (2) 7 East, 558.

(3) *Simon v. Metivier*, 1 Bla. 599. 3 Burr. 1921. *Emmerson v. Heelis*, 2 Taunt. 38. 1 Jacob & W. 350.

the case out of the statute, that either some note or memorandum be made of the bargain, or else some part of the goods delivered, or earnest or deposit given. It has been held, that the auctioneer's writing the name of the agent of the purchaser, together with the prices, opposite the lots purchased by him, in the printed catalogue, and the principal afterwards in a letter to the agent recognizing such purchase, coupled together, constituted a sufficient memorandum within the statute (1). But the catalogue must, in such case, contain a memorandum of the terms of the contract; for in a case (2) where sugars were put up to sale, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers, and they were accordingly sold, according to certain conditions of sale, which the auctioneer read to the bidders assembled, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made; it was held that the name of the purchaser, written by the auctioneer against the lot purchased, which was not annexed to the conditions of sale, nor had any internal reference thereto by context or the like, was the mere memorandum of the name of a person, and not a memorandum of a bargain under these conditions of sale (3). If, on a sale by auction of goods, the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and although all the lots together, purchased by the same person, exceed £10 in value, yet, if the lots are separately of less value than £10, a memorandum in writing is not necessary. (4)

Any judicial confession by the defendant, admitting the making of a parol contract, will take the case out of the statute (5). Thus, where a tender is pleaded to a count, upon a promise clearly within the prohibition of the statute, and money is paid into court, as is requisite to be done on that plea, the defendant thereby submits to the action, and shall not be afterwards suffered to resort to the protection of the

Effect of a party's
ADMISSION.

(1) *Phillimore v. Barry*, 1 Camp. N. P. C. 513.

(2) *Hinde v. Whitehouse*, 7 East, 567.

(3) See also *Boydell v. Drummond*, 11 East, 142.

(4) *Emmerson v. Heelis*, 2 Taunt. 38.

(5) Per Mansfield, J. in *Simon v. Metivier*, 1 Bla. 600. *Middleton v. Brewer, Peake*, N. P. C. 15.

statute (1). And in this respect the courts of equity and common law concur (2); but such admission must be express and unqualified, not relying on the statute (3), for where the statute is pleaded, and the exceptions of it negatived, the court of chancery will not compel the defendant to execute the contract (4); so if a parol agreement were stated in a court of law, and there was a demurrer which would admit the agreement, yet advantage might be taken of the statute (5), for by the demurrer the defendant says he is not chargeable, and therefore this is an admission insisting upon the statute.

When the statute of frauds has been once satisfied by a contract in writing, it is not necessary, in order to take the case out of the statute of limitations, that a subsequent promise to arrange the matter should be in writing. (6)

It remains here to observe, that under this statute the contract is held to be entire and incapable of separation; and therefore, if a part of it be of such a nature as would require a written agreement or memorandum by the statute, and the rest of it is of such a nature as would not require that form of testimonial, if it were by itself, the whole contract must be in writing, or the plaintiff will be precluded from recovering on any part of it. (7)

Of the sale of
ships and registry
acts.

We will now take a concise view of the legislative provisions respecting the registry of ships, and the transfer thereof; the principal object of which enactments is to furnish, through the medium of registration, an accurate knowledge at every instant of time, as far as practicable, of the name of every person having property in a British ship, in order to secure the benefit of that national character of a ship to his majesty's subjects, and to exclude foreigners from participating in them (8). By the 26 G. 3.

(1) *Middleton v. Parker, Peake*, in *Rondeau v. Wyatt*, 2 H. B. 68. N. P. C. 15.

(2) 2 Atk. 155. 1 Ves. 218. 221. Amb. 586.

(3) Pr. in Ch. 208. 353. 374. Ross, 27.

(4) *Whaley v. Bagenal*, 6 Bro. Parl. Ca. 45. *Whitchurch v. Beirs*, 2 Bro. C. Ch. 556. and cases there cited.

(5) Per Lord Loughborough,

(6) 1 Barn. & Ald. 690.

(7) *Cooke v. Jacobs*, Anstr. 420. *Lea v. Barber*, Id. 425. *Chater v. Beckell*, 7 T. R. 201.

(8) See *Richardson v. Campbell*, 5 Barn. & Ald. 202. As to the law and decisions in general relating to the transfer of ships, see 1 *Holt on Shipping*, 246. 276.

Ross, Vendor and Purch. 231.

c. 60. (1), all merchant ships employed upon the sea (2), (whether in the coasting trade or distant voyages, having a deck, or being of the burthen of 15 tons and upwards, and either built in Great Britain, Ireland, Guernsey, or the Isle of Man, or the colonies, plantations, islands, and territories under the dominion of his majesty, in Asia, Africa, or America, or taken in lawful war and condemned as prize, with the exception of vessels not exceeding 30 tons, and not having a whole deck, and solely employed in the Newfoundland fishery), are required to be registered in the manner and according to the form prescribed by this statute.

Upon the transfer of the property in any ship, in whole or in part, the certificate of the registry (3) of the ship is to be truly and accurately recited in words at length, in the bill or instrument of sale, otherwise such bill or instrument of sale shall be null and void to all intents and purposes (4); and no transfer or contract, or agreement for a transfer of property in any ship, is to be valid for any purpose either in law or equity, unless such transfer be by bill of sale or instrument in writing, containing the recital of the register in words at length. (5)

These statutes do not extend to a bill of sale from the original builder to the first purchaser, which is good without any recital of a certificate of registry (6); nor to a sale of vessels for inland

2 Schw. N.P. 1169. 5 ed. The 21 Jac. 1. c. 19. s. 11. as to assignees being entitled to property whereof the bankrupt is reputed owner is not repealed by the ship register acts, 2 Barn. & Ald. 193.

(1) Sect. 1 and 3. See Abbott, 4th ed. 29.

(2) Vessels employed in inland navigation only are not within these statutes. Peake, Rep. 140.

(3) Those cases in which the statutes require or permit the officers a registry de novo are, 1st, Where the old certificate has been lost or mislaid, 26 Geo. 3. c. 60. s. 22.; 2d, Where the certificate is wilfully detained by the master, 28 Geo. 3. c. 34. s. 14. 34 Geo. 3. c. 68. s. 19.; 3d, Where, after a transfer of part of the property in the same port, the owners of the part not transferred desire a new register, 34 Geo. 3.

c. 68. s. 21.; 4th, Where the ship is altered in form or burthen, 26 Geo. 3. c. 60. s. 24.; and 5th, Upon any transfer of property to another port, 7 & 8 W. 3. c. 22. s. 21.

(4) 26 Geo. 3. c. 60. s. 17. Ships registered in Ireland are subject to same regulations. Id. s. 44. 27 Geo. 3. c. 19. s. 1, 2. 39 & 40 Geo. 3. c. 67. art. 6. and 42 G. 3. c. 61.

(5) 34 Geo. 3. c. 68. s. 14. and 42 Geo. 3. c. 61. s. 16. As to the vendee's remedy on neglect of vendor to comply with these statutes, see Ross, 257.; and as to what relief he can obtain in equity, see 11 Ves. 321.; in general he cannot obtain any, 1 Maddox, 39.

(6) *Oxenham v. Gibbs* and another, K. B. Trin. Term, 1807. Abbott on Shipping, 54.

navigation only (1), and the sale may be of any part of the vendor's interest in the vessel (2). A bill of sale, purporting to be an absolute transfer, is void, unless the certificate of the registry be recited therein, though in fact only made as a security for the payment of a prior debt, and though the vendee had the grand bill of sale, and had taken possession of the ship immediately on her arrival (3). The indorsement, directed by these acts of parliament to be made upon the certificate, must be made upon a certificate which is valid and in force at the time, and such indorsement upon a certificate which has been delivered up to be cancelled, though such cancellation was done under a mistake, is of no avail (4). An indorsement on a certificate of registry made in pursuance of the 34 Geo. 3. c. 68. s. 15. need not be recited in the bill of sale. It seems, however, always prudent to recite, in a second and every subsequent bill of sale, the indorsement made in pursuance of every previous transfer (5). Notwithstanding the statute requires the true and accurate insertion of the certificate of registry in the bill of sale, it has been held that a mere clerical mistake shall not vitiate the bill of sale (6); but the mistake must not be material, or it will be fatal to the validity of the sale both at law and equity. (7)

Besides these requisites in every transfer of a ship, there are others which, though they do not form any part of the contract of sale, are yet necessary to its validity; and these relate, 1st, To the transfer of the property in a ship whilst in the same port to which she belongs; 2d, When absent from such port; 3d, When the vendors reside in a country not part of his majesty's dominions.

The provisions of 7 & 8 W. 3., as to indorsements on certificates of registry upon any alteration in the property of a ship *in the port to which she belongs* (8), being found insufficient, it is further provided by the act (the leading provisions of which we are detailing) that in addition to the indorsement required by the act of

(1) Peake, Rep. 141.

(2) 1 Taunt. 387.

(3) 3 T. R. 406.

(4) 6 East, 144.

(5) 1 Bos. & Pul. 483. 1 Holt on Shipping, 279. Abbott, 58.

(6) 4 T. R. 161. As to the alteration of mistakes see ante, 179. and 12 East, 471.

(7) 7 T. R. 306. 5 T. R. 709.

3 Bro. Ch. Ca. 571.

(8) The port to which a ship belongs is ascertained by 26 Geo. 3. c. 60. s. 5. to be that "from and to which she shall usually trade, or, being a new ship, shall intend to trade, and at or near which the husband or acting owner usually resides." 2 Selw. 1172. n. 2.

William, there shall also be indorsed on the certificate of registry, before two witnesses, the town, place, or parish, where the persons to whom the property in the ship, or any part thereof, shall be so transferred, shall reside; or if such person usually reside in any country not under the dominion of his majesty, but in some British factory, the name of such factory of which such person is a member must be expressed; or if such person reside in any foreign town or city, and is not a member of any British factory, the name of such foreign town or city must be mentioned, and also the name of the house or co-partnership, in Great Britain, for or with whom such person is an agent or partner; and the person to whom the property in such vessel is transferred is required to deliver a copy of such indorsement to the officer making the registry, who is to cause an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and also to make a memorandum in the book of registers, and to give notice to the commissioners of the customs; but the provisions in the above clause of 26 Geo. 3. c. 60. s. 16. not being deemed sufficient, the legislature subsequently directed that upon any alteration of property in any ship, in the port to which she belongs, an indorsement is to be made on the register, according to a form given by 34 Geo. 3. c. 68. s. 15. (1) to be signed by the person transferring the property, or by some person legally authorized for that purpose, and a copy of such indorsement is to be delivered to the person authorized to grant the registry, otherwise such sale or contract, &c. to be void. An entry thereof to be indorsed on the affidavit on which the original certificate was obtained, a memorandum to be made in the book of registers, and notice given to the commissioners of customs. (2)

These provisions embrace every case of the transfer of property in a ship, and they apply to any alteration of property in

(1) This form of indorsement, on change of property, is as follows: Be it remembered, that [I or we, names, residence, and occupation of the party selling,] have this day sold and transferred all [my or our] right, share, or interest, in and to the ship or vessel [name of the ship or vessel

mentioned in the written certificate of registry,] unto [names, residence, and occupation of the purchasers]. Witness [my or our hand or hands] this [date in words at full length].

Signed in the presence of
[two witnesses.]

(2) 34 Geo. 3. c. 68. s. 15.

the ship, whether the same be made by transfer of the whole or by the sale of any share or number of shares therein, amounting to less than the party's whole interest in the ship (1). But it is not necessary that upon a transfer of a share in a vessel the indorsement upon the certificate should express the share to be all the vendor's interest. (2)

A copy of the bill of sale of a ship while at sea, and while the vendee is resident in the port in which the ship is registered, must be delivered to the custom-house officer in that port, within a reasonable time after the sale, otherwise the transfer will be invalid (3); but this section does not extend to the case of a ship which, having been registered at one port, is sold while at sea to a purchaser residing at another port in this kingdom. In such case a registration *de novo*, in the port to which the ship is transferred by the purchaser on her return, is sufficient (4). Where a bill of sale was executed by a sole owner of a vessel belonging to the port of Sunderland (5), to a vendee residing in London, at the time when the vessel was in the port of London, the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21. only had been complied with, and not the requisites of the 15th or 16th sections of stat. 34 G. 3. it was holden that the bill of sale was void, for if the ship were not so absent, &c. as to bring her within the 16th section, then the requisites of the 15th section ought to have been complied with, and Lawrence, J. observed, that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21. which requires a register *de novo* upon any transfer of property to another port, because such transfer might take place without any change of property to another, the property continuing in the same owner; that the object of the legislature there was to provide for the transfer of property in a ship from one port of registry to another, but it did not direct the mode in which the transfer of property from one person to another in another port was to be made; that direction was supplied by stat. 26 Geo. 3. and 34 Geo. 3. And where A., having contracted for a ship to be built for him in the East Indies, agreed during the time of the building to sell a share to B., and B. paid part of the price in pursuance of the agreement, and afterwards, on the ship's arrival in England, A.

(1) 5 East, 427.

(2) 1 Taunt. 387.

(3) 5 Barn. & Ald. 196.

(4) Hubbard v. Johnson, 3 Taunt. 177.

(5) 8 East, 511.

caused her to be registered, and accounted with B. as part-owner, but B.'s name was never on the register as part-owner, it was holden (1) that B. had not any legal interest in the ship. But where a ship registered at the port of W. was transferred by a deed of assignment to owners resident in L., the ship being then in the port of L., it was holden that this transfer was not within the stat. 34 Geo. 3. c. 68. s. 15., but within the 16th section of that act, and that the transfer was valid, although no indorsement was made on the certificate of registry; it was holden also that the non-compliance with the 21st section of the stat. 7 & 8 W. 3. c. 22. did not avoid the transfer (2). So a bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the indorsement on the certificate of registry not being made within ten days after the return of the ship to her port (3). This requisite, when the ship is in port, should be complied with in the time. And a subsequent compliance will in no case be available by relation to the time of the contract of sale, so as to make the conveyance effectual for any antecedent time (4). But where the intermediate interests of third persons do not intervene, such requisites may be complied with at any time. (5)

Provision is made for the sale of vessels, either in whole or part, *when absent from port* (6). If a ship shall be at sea, or absent from the port to which she belongs, at the time when such alteration in her property shall be made, (rule 14.) so that an indorsement or a certificate cannot be immediately made, the sale or contract, or agreement for sale, shall notwithstanding be made by a bill of sale or other instrument in writing, as before directed, and a copy (7) of such bill of sale or other instrument in writing shall be delivered, and a copy of such bill of sale or other instrument in writing, and an entry thereof, shall be in-

(1) 2 Barn. & Ald. 248.

(2) 2 Barn. & Ald. 427.

(3) 3 Mcrival, 322.

(4) 5 Barn. & Ald. 196.

(5) 2 East, 399. Ross, 245.

(6) 34 Geo. 3. c. 68. s. 16.

(7) The legislature, in this case considering that the captain would do that which he ought to do, namely, have his certificate of registry on board with him, substi-

tutes a copy of the bill of sale in the place of the indorsement, on the certificate, still preserving the other regulations; and this is to serve till within 10 days after the return of the ship to her port, when the indorsement before required is to be made, and the other acts to be done as before mentioned. Per Lawrence, J. in 8 East, 525. 2 Selw. 1172. n. 3.

dorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs (1), and within ten days after such ship shall return to the port to which she belongs an indorsement shall be made and signed by the owner, or some person legally authorized for that purpose, and a copy thereof shall be delivered in manner herein-before mentioned, otherwise such bill of sale, or contract or agreement for sale thereof, is declared to be utterly null and void, to all intents and purposes whatsoever, and an entry thereof shall be indorsed, and a memorandum thereof made in the manner directed in the act (2). The intent of this statute is to prevent an interest passing in ships from one owner to another, until the public have that information which is so essential to its commercial welfare, and the conditions of this section must be strictly complied with; and where a bill of sale has been executed, and the requisites of the registry acts under certain circumstances are not completed, until the rights of third persons intervene, no relation will hold good, so as to make the conveyance effectual from any antecedent time (3). In most cases it is advisable that the grand bill of sale be delivered to the vendee; which delivery, in the case of a ship at sea, has been held to be equivalent to a delivery of the ship itself (4). The legislature having fixed a specific period after the ship's arrival for complying with the requisites of the act, the acts thereby directed to be done must be done at all events within the time; and therefore where some of the ten days next after the arrival in port of a ship which had been sold while at sea, and in particular the last of those days were public holidays, on which no business was done at the custom-house, from which cause the indorsement on the certificate of registry was not made within the ten days, it was held that no property passed to the vendee, and that the contract of sale was null and void, though the indorsement was made and the copy delivered on the next day of business. (5)

It is enacted by the 34th Geo. 3. c. 68. s. 17. that in all cases where the owner of any ship shall reside in any country, not

(1) This must be done within 637. 3 Taunt. 207. 2 M. & S. a reasonable time, or the transfer 43. 6 East, 144. will be void. 5 Barn. & Ald. 196. (4) 2 T.R. 462.

(2) 34 Geo. 3. c. 68. s. 16. (5) Gillespy v. Mestaer, Trin. 42 Geo. 3. c. 61. s. 18. Term, 1804. Abbott, 61. 5 Barn.

(3) 2 East, 400. See 11 Ves. & Ald. 196.

under the dominion of his majesty, as a member of some British factory, or agent for or partner in any house or co-partnership actually carrying on trade in Great Britain or Ireland, at the time when he shall transfer such property in any ship or vessel, so that an indorsement cannot be made immediately, nor a copy of such bill of sale or other instrument in writing be delivered, nor an entry thereof indorsed on the oath or affidavit, nor a memorandum thereof made in the book of registers, nor notice of the same be given to the commissioners of the customs in the manner before mentioned, the same may be done at any time within six months after such transfer shall have been made, and that within ten days after such owner or some person legally authorized for that purpose by him shall arrive in this kingdom, if such ship shall then be in any port of this kingdom, and if not, then within ten days after such ship shall so arrive, an indorsement shall be made by the owner or some person legally authorized for that purpose, and a copy thereof shall be delivered in manner herein-before mentioned, otherwise such bill of sale or contract or agreement for sale is declared to be utterly null and void to all intents and purposes whatsoever, and entry thereof shall be indorsed and a memorandum thereof made in the manner therein-before directed. (1)

These vacating provisions only relate to those acts that are required to be done by the immediate parties to the sale or transfer, and do not extend to the acts or omissions of strangers, and consequently any neglect of duty on the part of the officers will not render the sale void (2). Where there is not any time limited for the performance of the act required to be done by the party, as under the 16th section of 34 Geo. 3. c. 68., no time is limited for the delivery of the copy of the bill of sale by the party to whom the transfer is made to the registering officer (3), the statute is to be construed as if it had directed the act to be done within a reasonable time (4), although the bill of sale, or other such instrument, has its operation from the time when the requisites imposed on the parties to the sale have been complied with, yet no relation will be allowed to hold good, so

(1) 34 Geo. 3. c. 68. s. 17. See
form ante, 297. note 1.

(3) 2 M. & S. 43.

(2) 3 Esp. 69. 4 East, 110. 1 Taunt. 387.

(4) 2 Selw. N.P. 1175. 5 Barn.

as to make the conveyance effectual from any antecedent time (1). These statutes relate to transfers made by the party only (2), viz. from a former owner to a new owner, and do not affect assignments by operation of law, as in cases of bankruptcy, death, or marriage, &c. where the property passes to the assignees, representatives, or husband, without these forms (3). It is sufficient if the names of the several owners appear on the registry; it is not necessary that the proportions in which the owners are interested should be stated. Lastly (4), it is to be observed, that the register of a ship is directed to be kept, not for the sake of the persons making, or the persons accepting the transfer, but for purposes of public policy; hence to charge a person as owner of a ship, it is not sufficient merely to produce the register, for that cannot be made evidence, even *prima facie*, unless the person intended to be charged is connected with the entry, and it is shewn that every thing has been done by his authority or adoption. (5)

Of warranties.

The vendee of all kinds of property should, in order to obtain a security against the consequences of any defect in the quality or value of the thing sold, obtain a warranty from the vendor of its correctness and perfection in this respect, otherwise he will frequently be without remedy (6). In some cases, indeed, an implied warranty arises, without any actual stipulation between the parties, but by legal inference; for the most part, however, an express warranty is necessary.

In contracts for the sales of personal property the vendor impliedly warrants that the article he sells is his own, and if it prove otherwise he is liable, either for the breach of his implied

(1) See ante, 299. 2 East, 404. 8 East, 10.

(2) 5 East, 422.

(3) Robinson v. McDonnell, K. B. Trin. Term, 56 Geo. 3. 2 Barn. & Ald. 193. S.P.

(4) 2 Selw. N.P. 175.

(5) 2 Camp. 170. 2 Taunt. 5. 14 East, 226. See as to what extent this amounts to evidence of ownership, Ross on Vendor and Purch. 255. 7 T. R. 306. 8 East, 10. 4 East, 130.

5 Esp. 88. 5 T. R. 709. 1 Gow. 41. Owner, though not registered, may sometimes bring an action, 1 Gow. C. N. P. 41.

(6) As to warranties in general, see Long on Personal Property, 119. Ross, V. & P. 281. 1 Selw. N.P. 644. 2 Com. on Cont. 263. Holt, C. N. P. 632. As to the form of action for breach of warranty, see 2 Chitty on Plead. 136 n. The warranty must be false at time of sale. 2 Taunt. 343.

promise (1), or for the deceit (2); and this implied warranty arises whether the seller be in the actual possession of the article sold or not. (3)

It has been supposed that there is an implied warranty of the goodness and worth of an article arising from the conditions of all sales, and this supposition is grounded upon the principles of natural justice and equity, which ought to govern all the contracts of men, without reference to the particular quality of the thing for which they contract (4). But there is no such rule in the English law. It was formerly, indeed, a current opinion that what was termed a sound price was *per se* an implication of warranty, but this doctrine has been long exploded, and there must in general be an express warranty as to the quality or value of a personal chattel in order to maintain the action (5). An implication of warranty, however, may frequently arise from the wording or nature of the contract, or from the established or particular usage of trade; and this must of course depend on the nature of each particular contract. If a contract describe the goods as of a particular denomination, there is an implied warranty that they shall be of a merchantable quality, of the denomination mentioned in the contract (6); and where rye-grass was bought to sow, and which the purchaser did not examine, and it did not grow, in consequence of a defect in the seed, it was held that the vendor could not recover the price from the purchaser (7). If goods sold are described in the invoice as scarlet cuttings, a warranty is to be inferred that the goods answer the known mercantile description of scarlet cuttings (8). So where an ad-

(1) Dougl. 18. Cro. Jac. 474. 197. 1 Rol. Abr. 90. pl. 6. Carth. 90. 2 Bla. Com. 451. 3 Id. 166. 3 T. R. 57. Peake, C. N. P. 94. 1 Salk. 210. This implied warranty does not extend to real property (Dougl. 654. 2 Bos. & Pul. 13. 3 Bos. & Pul. 166.) if a regular conveyance has been executed. 6 T. R. 606.

(2) 3 Bla. Com. 166.

(3) 3 T. R. 57. acc. 1 Salk. 210. 1 Ld. Raym. 593. S. C.; but differently reported, Carth. 90. Cro. Jac. 197. cont.

(4) 2 Woodes. 415. 3 Wood. 199.

(5) Holt, C. N. P. 632. note. Dougl. 18. 1 Roll. Ab. 90. 2 East, 314. 3 Camp. 351. 2 Bla. Com. 451. 3 Id. 165. 2 Roll. Rep. 5. F. N. B. 94. a. acc. 2 Wooddes. 415. 3 Id. 199. cont.

(6) 4 Camp. 144.

(7) Blair v. Thorn, Guildhall, Jan. 1823, J. Pearson, attorney for defendant.

(8) 1 Stark. 504. See 4 Taunt. 853.

vertisement for the sale of a ship described her as a copper-fastened vessel, adding that the vessel was to be taken with all faults without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened, it was held, that notwithstanding the words "with all faults, &c." the vendee was liable for the breach of warranty (1). So in all contracts for the sale of provisions it should seem that there is an implied warranty that they shall be wholesome, and it has been held that the vendor of an article impliedly warrants that it shall answer the purpose for which it is sold, though this latter doctrine, as a general rule, seems questionable (2). An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers (3). If goods are ordered to be manufactured, a stipulation that they shall be proper and saleable is implied (4), and so it is in the sale of goods where no opportunity of an inspection is given (5), and especially if the goods are for a foreign market. (6)

But if there be a latent defect in the thing sold, which defect is unknown to the seller, though a fair price be given by the buyer for the commodity, the law does not in general raise an implied warranty that it shall be merchantable (7). In a verbal sale by sample it is an implied warranty that the thing sold corresponds with the bulk of the sample (8). But in a written contract of sale by sample a stipulation must be inserted that the commodity corresponds with the sample, otherwise parol evidence is inadmissible to make such stipulation part of the contract (9). An implied warranty will arise from the non-observance of the usage of trade in specifying defects; and it being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue; and drugs which are repacked, or the packages of which are discoloured by sea-water, bearing an inferior price although not damaged, the defendants, who had pur-

(1) 5 Barn. & Ald. 240.

(2) See 1 Stark. 384.

(3) 2 Camp. 391. 3 Camp. 296.

(4) 4 Campb. 144. 169.; and 6 Taunt. 108.

(5) Id. Long, 121.

(6) Id. *ibid.* Ante, 271.

(7) 2 East, 314. 1 Stark. 384. 3 Campb. 154. 506.

(8) 4 Campb. 144. 169.

(9) Id. *ibid.* 2 Camp. 22.

chased some sea-damaged pimento, repacked it, and advertised it in catalogues, which did not notice that it was sea-damaged or repacked, but referred it to be viewed, with little facility, however, of viewing it; they exhibited impartial samples of the quality, and sold it by auction; it was held that this was equivalent to a sale of the goods as and for goods that were not sea-damaged, and that an action lay for the fraud. (1)

Express warranties may be either general or special, as relating to the subject-matter of the contract; the advantage arising to the buyer, from an express warranty as to the quality or value of the commodity sold, is that such warranty extends to any defect in such quality or value, known or unknown to the seller, and if the warranty be false, he has his remedy over against the seller, or may refuse to keep the commodity. In order to constitute an express warranty, the declaration of the seller should be positive and explicit, and not a mere surmise or affirmation of his opinion; for if a man state what he believes to be true, giving the purchaser at the same time to understand that he has no absolute knowledge on the subject, it would be very hard if he should be held bound by such a representation, though the supposed incident or quality which he represented to belong to the subject, or some fact which he had stated concerning it, should be afterwards proved not to exist; where therefore a man, on the sale of a horse, referred to a written pedigree of the animal, to ascertain his age, and at the same time stated to the buyer that he knew nothing more about it than what the pedigree disclosed, he was held not to be liable to an action on account of the pedigree proving false, of which fact the seller had no knowledge at the time of the sale (2). The mere insertion of the name of an artist in a catalogue, as the painter of any particular picture, is not such a warranty that will subject the seller to an action, if it turn out that he was mistaken (3). A future event may be warranted (4). A general warranty will not extend to guard against defects that are plainly and obviously the objects of sense; as if a horse be warranted perfect, and wants either an ear or a tail, unless the buyer in this case be blind.

(1) 4 Taunt. 847.

Taunt. 405.

(2) Peake, 123. Declaration on warranty that seed was good, "which defendant could warrant," held sufficient after verdict, 7

(3) 1 Esp. N. P. C. 572.

(4) Dougl. 735. See 3 Bla. Com. 166. ante, 100.

But if cloth be warranted to be of such a length when it is not, an action lies, for that cannot be discerned by sight, but only by measuring the cloth; and so it lies, if to discern the defect some skill is required. (1)

The warranty must take place at the time of the sale, for if it be made afterwards, and not at the time of the sale, it is a void warranty, unless in writing under seal (2), and the warranty should always form a part of the contract; and where before or at the time of the sale, a specimen or sample of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample (3); but, under circumstances, where the warranty can be connected with the subsequent contract of sale, it is binding, though made before the actual sale, as if upon a treaty for the buying of certain goods, the buyer should ask the seller if he would warrant them, and he should warrant them, and on the buyer demanding the price, the seller should fix it, and allow the buyer two or three days to consider it, and then the buyer should come and give the price, the warranty, though made before, would be considered part of the contract, and would be binding (4). The same modes must be adopted in the construction of contracts of warranty as in all other contracts. (5)

Action for
deceit.

Though there be neither any express or implied warranty upon a contract, so as to render the vendor liable for a breach of it, yet if he practice any intentional deception for the purpose of disguising the latent defects of a commodity, and in order to elude the vigilance of the buyer, he would be liable for the deceit (6); as if at the time of the sale of goods, the vendor ex-

(1) 3 Bla. Com. 165. 1 Salk. 211.

(2) F. N. B. 98. 2 Lord Raym. 1120. 1 Stra. 414. Dyer, 76 a. Cro. Jac. 197. id. 630. 1 Vin. Ab. 578. But subsequent admissions will amount to evidence of prior warranty, 7 East, 274. 3 Smith, 131.

(3) 4 Camp. 144.

(4) Ld. Raym. 1120. 1 Roll. Ab. 96. l. 5. 1 Salk. 211.

(5) See ante, 106, &c.; as to construction of warranty of horses, see

Holt, C. N. P. 682. Long, 124. Ross, 295. 1 Selwy. N. P. 144.

(6) 3 Camp. 506. 12 East, 11. 4 Camp. 22. 1 Roll. Ab. p. 90. Action sur Case, p. 4. ib. p. 3. Kitch, 174 a. Cro. Jac. 4. Peake, N. P. C. 115. An action for deceit in giving a false warranty lies, though the vendee may frequently adopt the action of *assumpsit*. The latter action, however, seems preferable, where the gist of the action is the defect in the war-

hibit a sample to deceive the buyers, and the purchaser is thereby deceived, the vendor is liable (1). We have before considered as to what deceit is necessary in this respect, in order to invalidate a contract (2); in addition to this, however, it must be observed, that the deception must be intentional, and a scienter of the defect must in all cases be proved (3). If a party sell a ship with all faults, yet if he knows of any defect therein, and uses some artifice to prevent its being discovered by the purchaser, he will be liable for the deceit (4). It should seem, however, that the mere knowledge alone of a defect in a commodity sold, without any art used to conceal, would not render the vendor liable in an action for deceit; but he must be either silent, or speak the truth, and disclose the fact if called upon so to do. Where the vendor of a ship represented her to have been built in 1816, although in fact she had been launched a year earlier, the vendee is entitled to recover for the deceit, though the ship was to be taken with all faults (5). The deception must be such as would impose on a man of ordinary sense, unless indeed the purchaser be peculiarly deprived of the sense requisite to discover the deception; thus, if the vendor produces a horse, and represents it to be perfect, and it wants either a tail or an ear, he would not be liable for the deceit, as it would be plain and obvious that the horse was defective in this respect, unless the purchaser in this case be blind (6); but if cloth be warranted to be of such a length, when it is not, an action on the case lies, for that cannot be discerned by sight, but only by measuring the cloth; and if a horse be warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet, as the discernment of such defects is frequently matter of skill, it has been held that an action on the

ranty, 2 East, 451. 2 Chitty on Taunt. 779.

Pl. 136. n. e. This action for deceit lies, though it be stipulated that vendee may return article if he dislike it, 1 Stark. 162. An indictment will not lie for this deceit, *R. v. Pywell*, 1 Stark, 402.

(1) 4 Camp. 22.

(2) Ante, 155.

(3) *Dale's case*, Cro. Eliz. 44. Cro. Jac. 4. Aley, 91. 2 East, 448 n. S. C. 2 East, 450 n.

(4) 3 Camp. 154. id. 351. 4

(5) 2 Stark, 561. id. 162. 5 B. & A. 240. It has been held that if the vendor of a picture, knowing that the vendee labours under a delusion with respect to the picture, which materially influences his judgment, permits him to make the purchase without removing that delusion, the sale is void. See 1 Stark, 434. *Sed quere*, see ante, 304.

(6) 3 Bla. Com. 165.

case lies to recover damages for the imposition (1). If a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for the deceit lies against the vendor, on the ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not (2). We have before seen as to what the vendor should do to rescind a contract, on account of a false warranty, or of any deceit in the sale of goods. (3)

Contracts of
exchange.

An exchange of property is the transferring it from one person to another, in consideration of some remuneration and return to be given by the latter, and it differs from a sale in this particular, that in a sale the remuneration or return which the vendor is to receive is to be a payment in money, but in an exchange one commodity is given for another. Both sales and exchanges are founded on a valuable consideration, by which the party who disposes of his goods is induced to make the sale or exchange; the principles of law, by which contracts of exchange are regulated, are in general the same as those regulating contracts of sale. (4)

Other points af-
fecting contracts
of manufacture,
sale, and ex-
change.

We have before stated that in general a stamp is not necessary on an agreement for the sale of personal property (5); and the principles and rules to be found in the preceding chapters relative to the construction and legal operation of contracts (6),

(1) 3 Bla. Com. 165. 1 Salk. 211.

(2) 4 Taunt. 779. 4 Camp. 22. id. 144.

(3) Ante, 156.

(4) Ante. 2 Bla. Com. 323. 446. 3 Salk. 157. In exchange of one commodity for another, there is in general no implied warranty. 3 Camp. 351. The principles and rules of construction of contracts of warranty upon sale govern those of contracts of exchange. Upon agreement between two traders to change goods for goods, after a balance is struck between them, such balance is to be paid in money.

1 Stark. 185. Where two tradesmen agree to deal with each other by way of barter, if one refuses to account the other may arrest for the whole value of goods which he has furnished to party refusing. 5 Taunt. 259. In contract of exchange of watch for candlesticks warranted silver, party cannot recover back watch, though warranty be false. 3 Campb. 299. The contract should in general be declared on specially. 1 H. Bla. 287. Holt, C.N.P. 179. 3 Marsh, 495.

(5) Ante, 170.

(6) Ante, 106 to 118, and see Long on P.P. 105.

the practical manner of executing them (1), and how the performance of them may be suspended or delayed (2), altered, cancelled, or annulled (3), or released or excused performance (4), will for the most part be found applicable to this part of the subject.

Lastly, we have cursorily to consider contracts of *loan* of money or stock, of *annuity*, *bottomry*, and *respondentia*, which are frequently entered into for the purpose of facilitating commercial transactions. Contracts for lending and borrowing of money are generally simple, and few points of law arise respecting them, excepting those relating to the securities for repayment, and the interest or remuneration to be paid to the lender. Any person may be a party to a loan, with the exception that an infant must not be the borrower (5). The loan may be for an indefinite or fixed time. In the former case, the lender may at any time, without any previous demand, proceed to recover back the money lent. The advance may be on a parol promise of repayment, either express or implied, or it may be secured by written contract. A mere unstamped I. O. U. is sufficient evidence at law to enable the lender to recover back the money (6). But it is advisable, especially where the sum is considerable, or interest is to be paid, or a security is required, to have a formal document, either a promissory note, bill of exchange, bond, mortgage, or warrant of attorney, some times accompanied with a guarantee to secure the repayment; a promissory note for the payment of £50 with interest is sufficiently stamped with a stamp for the precise amount of £50 (7). A bill of exchange payable at a fixed period is one of the most usual securities for the loan of money by way of discount, as the lender, by retaining the amount of discount, obtains compound interest (8), which he cannot do by the intervention of a bond or mortgage (9). But where the loan is considerable, or a security is to be executed for future advances, a higher se-

Contracts of loan
of money and
stock.

(1) Ante, 118 to 139.

(2) Ante, 139 to 140.

(3) Ante, 140 to 144.

(4) Ante, 144 to 162.

(5) Ante, 18.

(6) Ante, 167.

(7) Ante, 173. 4 Bar. & Ald. 204.

(8) Lloyd v. Williams, 2 Bla. Rep. 792. 3 Wils. 256.

(9) Noy, 41. Cro. Jac. 25. Moore, 644. Chitty on Bills, 6 ed. 83.

curity is usually required, as a mortgage or bond, and warrant of attorney, so as to bind the land and affect the heir of the borrower; and it is very usual in commercial transactions for bankers and others, who are required to make advances from time to time to a tradesman, either in acceptances or cash, beyond the amount of the money and securities deposited by him in their hands, to take the latter security, with a defeazance enabling them to sign judgment and issue execution, even before they have actually been obliged to pay money in pursuance of the engagements they may have come under, which security is perfectly valid in law, and will not be disturbed either in equity or in case of bankruptcy (1). In these cases, where, after taking such security, there is a change either in the firm of the lenders or the borrowers, the former security will not operate as a continuing security for subsequent transactions, or indeed in some cases for the arrear, unless it be expressly so agreed by the terms of the security (2); and therefore it is in general necessary upon such change of circumstances to have a fresh security. (3)

Interest.

Interest is usually stipulated for on the loan of money. But unless there be such express stipulation, or a written security, to repay the principal money on a fixed day, no interest is payable, and a parol loan of money does not carry interest (4). A bond, conditioned for the payment of money, without naming any day, carries interest from the date (5). But the general usage of trade in transactions of a similar nature may vary the case; and therefore, on affirming judgment in a writ of error, in the Exchequer chamber, in an action by bankers for the balance of their account, the chancellor awarded interest, it being notorious that bankers usually charge interest on their advances (6), though, in a common case of money lent, no interest could have been recovered on the affirmance of the judgment. (7)

With respect to the amount of interest on a loan, the statute 12 Ann. c. 16. limits it to the rate of £5 per cent. on all contracts entered into in Great Britain. This statute and the de-

(1) 2 T. R. 105.

(2) 4 Taunt. 673. 2 Bar. & Ald. 39.

(3) Id. ibid.

(4) 15 East, 223. 1 Rose, 399.

(5) 7 T. R. 124. 15 East, 225.

(6) Wright v. Bonter, in Exchequer chamber, Hilary Term, A.D. 1823; and see 4 Taunt. 298. 346.

(7) 4 Taunt. 346.

cisions upon it, and the charges for commission, we have already considered, when examining the illegality of a contract in respect of usury (1). There is no objection to an agreement or a course of dealing by which bankers make half yearly rests in their accounts, making interest and commission carry compound interest (2); and an agent or factor who advances money for his principal may, at the end of a year, charge compound interest without any express contract to do so (3). An exception to the rate of interest was introduced by the 14 Geo. 3. c. 79. authorizing the loan of money in England at a higher rate than £5 per cent., on the security of *land* in Ireland and the colonies, but that statute does not authorize any other security, and therefore where A. contracted with B. for the sale of an estate in the West Indies, and it was agreed that part of the purchase money should remain, secured by the *bond* of B. and C., and that bond was afterwards cancelled, and another executed in England by B. and D., reserving £6 per cent. interest, in the same manner as the former one, such contract was held to be usurious (4). A contract for the repayment of a debt with legal interest, or, at the option of the creditor, to transfer so much stock as it would have produced on the day it was payable, is void as usurious; the principal and interest being secured, with the chance of rise of the stock—not therefore like a contract to replace stock absolutely, which might fall (5). So a contract to cover losses, or to replace at a higher price than the value of the money in stock at the time of the bargain, is illegal (6). In an action for not replacing the stock, the plaintiff is entitled to recover the amount of the money such stock would have produced on the day fixed at the time it should have been replaced, or on the day of trial, at his option. (7)

Assistance in commercial transactions may also be afforded by the loan of *stock* in the public funds, which, though the borrower may have to pay more than £5 per cent. for the money he may actually receive, and may have to invest in return more than such principal money, yet the transaction will be legal.

(1) Ante, 87, &c. and Chitty on Bills; see also further as to interest, commission, &c. Chitty on Bills, 6 ed. 83 to 89.

(2) 5 Barn. & Ald. 34. 2 Anst. 495. Chitty on Bills, 6 ed. 85.

(3) 3 Campb. 467. 1 Marsh. 224, 5.

(4) 3 T. R. 425.

(5) 17 Ves. jun. 44.

(6) 11 East, 616.

(7) 2 Taunt. 257½

Thus, it was held that the loan of money produced by the sale of stock, on an agreement that the borrower shall replace such stock on a certain day, or repay the money on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed £5 per cent., unless the transaction be colourable, and a mere device to obtain more than legal interest (1). So an agreement in satisfaction of a subsisting debt, and in consideration of forbearance, to invest as much stock at a future day as the debt would have purchased on the day of the bargain, and to pay so much as the dividends would have amounted to in the mean time, is legal. (2)

Annuity contracts.

The mode of raising money or purchasing a business by way of *annuity* is not unfrequent. An annuity is a certain annual sum of money granted to a person during his life or the lives of others. As the duration of the payment depends on the life of the party during whose existence it is to be paid, and the continuance of the payment is consequently uncertain and contingent, the law does not attach the penalties of usury to an annuity transaction, unless it be merely colourable, however exorbitant the terms may be with reference to the sum advanced (3). But equity will relieve if circumstances of deceit appear (4). And in order to protect the distressed and careless borrower from the avarice and imposition of the wealthy lender, the legislature has introduced several wholesome provisions. The statute 53 Geo. 3. c. 141. s. 2. provides for the enrolling a memorial of the annuity securities, with the time prescribed, and prohibits the detention of any part of the consideration money for any undue purpose (5). But by the 3 Geo. 4. c. 92. s. 1. it is provided that by the said act of the 53 Geo. 3. no further or other description of the subscribing witness or witnesses to any annuity instrument is required in the memorial thereof besides the names of all such witnesses. The 2d section renders it sufficient to enrol a memorial of the deed whereby the annuity is granted, without noticing any other deed for securing the annuity. The presumption is, that the annuity is valid, and has been duly memorialized; and it is not therefore incumbent on a party suing

(1) 3 T. R. 531. 8 T. R. 162.

(2) 8 East, 304.

(3) Hunt on Ann. 3.

(4) Hurst on Ann. 4.

(5) 4 Barn. & Ald. 281.

on or claiming title by virtue of an annuity deed to prove an enrolment of the memorial thereof (1), unless indeed, in the case of an action thereon, the defendant expressly traverse the fact, and then it will be for him to point out and prove the particular defect in the memorial. The memorial need not state that the annuity is redeemable, nor the name of the party in whose favour the warrant of attorney is given (2), nor the penalty of such warrant (3); nor need the residences of the parties for whose lives the annuity was granted, nor the circumstance that the annuity was payable for a term of years determinable on those lives, or either of them, be stated (3). The 6th section of the 53 Geo. 3. is not imperative on the court, but it is in their discretion either to vacate the securities given for an annuity in case of a violation of that clause of the act, or to do so on certain terms, or to refuse to do so, according to the circumstances of such particular case (4). Within the words in the excepting clause of the act, "nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth," it seems that if the consideration be the relinquishment of a business (5), or the *bonâ fide* sale of premises, whether the same be freehold or leasehold (6), or any other consideration than the advance of money, no memorial is necessary.

The power of the master of a vessel to hypothecate or mortgage the same for the expences of the necessary reparation or victualling thereof in a foreign port, where the master has no other mode of obtaining supplies on his own credit, or that of the owners, with whom a ready communication is impossible, will hereafter be considered. This power rests on a principle of convenience and necessity, and appears to have prevailed in all maritime countries, even in the infancy of commerce. And from this authority of the master Sir William Blackstone (7) considers that the contracts by bottomry and respondentia arose under peculiar circumstances, justifying the hypothecation of the ship, the master may in *that character* pledge the ship by an instrument in the nature of a bottomry bond (8). But a bot-

Bottomry and
respondentia
contracts.

(1) 3 Campb. 7.

(2) 3 Barn. & Ald. 206.

(3) 4 Barn. & Ald. 281.

(4) 6 Barn. & Ald. 61.

(5) 4 T. R. 793.

(6) 2 B. & B. 702.

(7) 2 Bla. Com. 457. Sed vide
Abbott, 4 ed. 143.

(8) Abbott on Shipping, 143.
2 Holt, 398.

tomry or respondentia bond (1), *properly* so called, is an instrument entered into by the owners of a ship for the purpose of raising money to enable them to prosecute their destined voyage. By the *bottomry* bond the owners pledge the keel or *bottom* of the ship, which is used figuratively to express the whole body thereof, as a security for the repayment of the principal money advanced, and such interest as may be agreed upon, on this condition, that if the *ship* be lost, the lender is not entitled to a return of his money. By the *respondentia* contract the borrower pledges, not the vessel, but the *cargo* therein, which is in effect pledging merely his own *personal responsibility*, as from the terms and nature of the transaction it neither does or can furnish the lender with any specific lien on the particular goods (2). There is also this further difference between bottomry and respondentia, namely, that on the latter the lender's right to a return of his principal and interest is not affected by the loss of the *ship*, but he merely risks his money on the safe arrival of the *cargo*. In all other respects these contracts are subject to the same principle and rules of construction (3). There is this peculiarity attending the contract of bottomry and respondentia, that however high the premium or interest agreed upon may be, the transaction cannot be impeached with reference to any of the laws against usury, in consequence of the risk to which the lender is exposed. This risk must be *bonâ fide*, and put in jeopardy the principal advanced, and the interest thereon, or the principal without the interest, otherwise the contract is void (4). The amount of the premium or interest has not, in this country, been regulated by any law, except in the case of money lent on ships or goods going to the *East Indies*. It is enacted by the statute 19 Geo. 2. c. 37. s. 5. that all sums of money lent on bottomry, or at respondentia, upon any ship or ships belonging to his majesty's subjects, bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects laden or to be laden on board of such ship, and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have

(1) This mode of taking up money is now seldom resorted to, see Marshall, 738. (1) This mode of taking up money is now seldom resorted to, see Marshall, 738. (2) Holt on Shipping, 425, 6. (3) Park. Ins. 616. (4) 2 Bla. Com. 457, 8. Holt,

(2) See 2 Bla. Com. 457. Park. 422.

a right to make assurance on the money lent; and no borrower of money on bottomry, or at respondentia as aforesaid, shall recover more on any assurance than the value of his interest on the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance, and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and the merchandizes be totally lost. This statute was introduced for the protection of the trade of the East India company; and its rules must be complied with in the case of bottomry by the master. To prevent British subjects from trading to British settlements in India under foreign commissions, and to encourage the lawful trade to these settlements, it is enacted by the statute 7 Geo. 1. c. 21. s. 2. that all contracts by or in trust for his majesty's subjects, by way of *bottomry* on any ship in the service of *foreigners*, bound or designed to trade within the limits of the *East India Company's* charter, shall be void.

The risks or contingencies to which the lender is exposed, and on which his claim to repayment depends, are for the most part enumerated in the instrument, and are substantially similar to those to which an underwriter, in a policy of insurance, is subject. These risks are sea perils, tempests, pirates, fire, capture, and all other misfortunes, except such as arise from the defects of the vessel, as from its not being sea-worthy, &c. or from the misconduct of the borrower, as by a wilful deviation from the track of the voyage (1). However, in the case of a capture, or loss of the vessel, the lender is entitled to repayment, unless the taking or destruction be actual, final, and total, so as to occasion a complete and irretrievable loss to the borrower; for if the capture be temporary, or the vessel still exist, however seriously damaged, the bond is not forfeited, and the obligee may recover (2). The exact period

(1) Park, 631. 2 Holt, 422. (2) Park. 626, 7. 1 M. & Selw. 30.

from which the risk is to commence is generally pointed out by the bond. When it is expressed that the ship "shall sail from London" to a certain other port, the contingency does not begin till she sails, and consequently, in such case, if any accident occur before the inception of the voyage, the borrower is not excused from payment; but if the condition be "that if the ship shall not arrive at such a place by a certain time, then," &c. the risk commences from the *time of sailing*, and a different rule as to the loss will necessarily prevail. (1)

A lender on bottomry or respondentia has this advantage over an ordinary insurer, that he is not liable to contribute in the case of general average, but is exposed to this disadvantage, that he is not entitled to the benefit of salvage. (2)

In the case of an *hypothecation* of the ship by the master in a foreign port for necessities, the lender may, by a suit in the Admiralty court, recover the ship itself in specie (3). In this particular instance the proceedings are *in rem*. But in the case of a *bottomry* or *respondentia* contract, properly so called, this remedy by suit in the Admiralty against the vessel itself is not open to the lender (4). If the instrument contain any transfer or conveyance of the property in the ship, though it be only as a collateral security, it should seem that the registry acts would take effect thereon.

(1) Park, 626.

(2) Park, 627. 629. 4 M. & Selw. 141.

(3) Abbott, 150, &c.; although by the terms of the contract of

the hypothecation the property in the vessel is not immediately conveyed by the master, see 2 Ld. Raym. 984.

(4) Abbott, 146.

CHAP. VI.

Of Guarantees, Sureties, &c. (1)

A GUARANTEE is a contract to be answerable for the payment of some debt, or the performance of some other act by another person who is, in the first instance, liable to such payment or performance (1). At common law no particular form was essential to the validity of such an engagement, and it might have been made either by deed or parol (2). Our prior enquiries into the form and effect of contracts in general will be found here applicable (3). The consideration of a contract of guarantee is an incident necessary to its validity at common law (4), and must, as in other cases, be either a matter of advantage to the party promising, or detriment to the other party (5), or both, brought about in consequence of the previous request, express or implied, of the promiser; or in other words, any damage or any suspension of right, or any possibility of loss occasioned to one party by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the party promising (6). But at common law no written contract was necessary; and if one were made, it was not necessary that it should specify the consideration on which it was founded.

Thus rested the common law; but to avoid fraud and perjury it was enacted, that “no action shall be brought whereby to charge the defendant, upon any *special promise*, to answer for

Statute of
Frauds.

(1) See Fell on Guarantees, 1.
 (2) 1 Saund. 211 a. Note by Serj. Williams.
 (3) Ante, 68, &c.
 (4) 1 Saund. 211. a. 1 Rol. Ab. 27. pl. 49. Jones v. Ashburnham, 4 East, 455. 1 New Rep. 172.
 (5) Per Lord Ellenborough, 4 East, 463, 4.
 (6) 3 Burr. 1663. Fell on Guarantees, 3. 1 Saund. 211. note 2. 2 Ld. Raym. 919. 3 T.R. 24. 2 Hen. Bla. 212. 2 Saund. 136.

the *debt*, *default*, or *miscarriage* of another person, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized (1).” As this statute speaks only of special promise and agreement, a bond or other contract under seal, or of record, is not within the act; nor is it necessary that the consideration on which a surety becomes a party to either of those instruments should be noticed therein.

The term *debt* includes every species of contract which the original party was liable to perform, and when the surety comes in aid of him; and the terms *default* or *miscarriage* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract (2). The principle of this act is, that where a man undertakes to do something which by law he is not bound to perform, but some other person was, it should be in writing (3). Many difficult questions have arisen on the construction of this branch of the statute, from making use of the term collateral, a term not adopted in the act, and it will be found expedient to consider this clause of the statute with reference to

- 1st. What will constitute a guarantee.
- 2d. How to be construed.
- 3d. How guarantee may be discharged.
- 4th. How the party guaranteeing may be relieved.

How guarantee constituted, and of the liability of the original party.

It is necessary, to bring a case within this part of the statute, that the party for whose debt, default, or miscarriage an undertaking is given by another, should himself be liable for such debt, default, or miscarriage, at the time of entering into the undertaking, and that the undertaking itself must be to incur the same or part of the same liability which the original debtor was subject to (4); for if B. be not liable for that which A. undertakes on his behalf, the undertaking of A. is not, as it is termed, a collateral undertaking for B. within the meaning of this statute,

(1) 29 Car. 2. chap. 3. sect. 4. Ald. 617.

(2) Kirkham v. Marter, 2 Barn. & Ald. 617. 1 Wilson, 305. (4) 1 Wils. 305. 2 Wils. 94. 3 Burr. 1889. 7 T. R. 201.

1 Saund. 211. a.

(3) Per Best, J., 2 Barn. & 124.

1 Saund. 211 a. 1 New Rep.

but an original promise for A. himself, against whom alone the remedy can be enforced (1). If, however, B. be liable at all, A.'s undertaking should be in writing, or it will be void by the statute (2). Where the defendant had asked M. (one of the plaintiffs) whether he was willing to serve J. S. with goods? M. answered, that he did not know J. S.; to which the defendant replied, *if you do not know him, you know me; and I will see you paid*; M. then said he would serve him; to which the defendant answered, *he is a good chap, but I will see you paid*. A letter was afterwards received by the plaintiffs from J. S., containing an order for certain goods, which were afterwards sent to him. The plaintiffs made J. S. the debtor for these goods in their books. J. S. having refused to pay for the goods, an action for goods sold and delivered was brought against the defendant. The court held that the case was within the statute, there not having been any promise in writing, and gave judgment for the defendant (3). So, if A. promise B., being a surgeon, that if he will cure D. of a wound, he will see him paid, this is only a promise to pay if D. does not, and therefore it ought to be in writing; on the other hand, if A. promise in such a case that he will be B.'s paymaster, whatever he shall deserve, it is immediately the debt of A. (4). Where A. had wrongfully, and without the license of B., ridden his horse, and thereby caused its death, it was holden that a promise by a third person to pay the *damage* thereby sustained, in consideration that B. would not bring any action against A., was a collateral promise within the statute of frauds, and should be in writing (5). It is not necessary that the debt, default, or miscarriage should be existing or incurred at the time of making the undertaking, though an opinion to the contrary did formerly prevail (6). And therefore a promise on the behalf of another, for the payment of the price of goods *before* the delivery of such goods, was holden *not* within

(1) Ld. Raym. 1085. 6 Mod. Fox, 1 Stark. 270.
248. S. C. 1 New Rep. 124.

(2) See general rule laid down by Buller, J., 2 T. R. 81. 1 Hen. Bla. 120.

(3) Anderson v. Hayman, 1 Hen. Bla. 120. Birkmyr v. Darnell, Ld. Raym. 1085. 1 Salk. Rep. 27. S. C. Rothery v. Cary, Bull. N. P. 281. Kirkham v. Marter, 2 Barn. & Ald. 613. Jones v. Cooper, Cowp. 227. Barber v.

(4) Id. ibid.

(5) Kirkham v. Marter, 2 Barn. & Ald. 613.

(6) See Jones v. Cooper, Cowp. 227. Matson v. Wharam, 2 T. R. 80. Anderson v. Hayman, 1 Hen. Bla. 120. acc. Mawbrey v. Cunningham, Sittings after Hil. Term, 1773, cited in Jones v. Cooper, Cowp. 227. Legg v. Gibson, 2 Selw N. P. 810. 1 Saund. 211 a.

the statute, because at the time of the promise there was not any debt. But this distinction is now overruled. Where the promise is to incur the same liability of a third party, it will not take it out of the statute, that such a promise was coupled to do something else not within the statute; but such promise being entire, an action cannot be maintained even for such part of it as would otherwise have been valid. (1)

On the other hand, if there be any consideration springing out of any *new* transaction, or moving to the party promising, upon some fresh and substantive ground of a personal concern to himself, the statute of frauds does not attach upon such promise, but the same, though verbal, will be good, if the consideration be sufficient (2). If a creditor, at the request of a third person, agree to discharge his original debtor as to any liability to himself, and accept such third person as his debtor in his stead, this will be a good consideration, and not within the statute (3). So where A., being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors 10s. in the pound, in satisfaction of their debts, which they agreed to accept and to assign their debts to B., it was held that this agreement was not within the statute of frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts (4). Where a person promised to pay the plaintiff in an action for assault and battery the sum of £50, if he would withdraw the record in the action, the court held this promise to be founded on an original consideration, and not within the statute, on the ground that the defendant in the original action was not a debtor, nor guilty of any default or miscarriage, till a verdict was given against him, and the court added that the true difference was between an original promise and a collateral promise, the first was out of the statute, the latter was not, when it is to pay the debt of another, which was already contracted (5). So where a broker, being employed to sell the goods of an insolvent for the benefit of creditors, in order to prevent the landlord from distraining, gave him a parol promise to pay the rent

(1) 7 T. R. 201. Austr. 420. Rep. 124.
425, note.

(2) Roberts, 233. 2 East Rep.

325. Fell, 14. 3 Burr. 1886.
2 Wils. 308. 1 Salk. 28. 1 New

(3) 1 Salk. 29.

(4) 1 New Rep. 124.

(5) See Read v. Nash, 1 Wils.
305. 1 Saund. 211 a.

in arrear if he would desist; this was holden not to be within the statute, because the landlord had a lien on the goods, a legal pledge, the parting with which was a good consideration for the promise (1); and the same doctrine was extended to a verbal promise to a broker to provide for his acceptances in favour of another person, if he would give up certain policies on which he had a lien (2). So where a defendant taken on a ca. sa. was discharged out of custody by the consent of the plaintiff, the debt itself was extinguished, and the defendant was no longer liable; and therefore a promise by a third person to pay that debt, on condition of that discharge, was held to be an original promise not within the statute (3); but if no stipulation for the discharge be made, and the original debt be permitted to subsist, the undertaking is merely collateral, and the agreement must be in writing. So where nothing more is stipulated for than an indulgence to the debtor, as that an action commenced shall be stayed, the undertaking of a third person to pay the debt is within the statute, for the original debt still continues, and the undertaking is but collateral (4). And a contract to secure to a creditor either the whole or so much in the pound of another's debt, not amounting to an absolute purchase of the debt, is within the statute (5). The third party must be liable at the time of making the promise, and where the defendant promised to be answerable for money lent to another, who turned out to be an infant, it was held that the promise was not within the statute (6). So if the person who makes the promise was in any respect liable originally to the debt, default, or miscarriage, either alone or jointly with others, it does not come within the statute (7). Where a party actually purchases goods himself, which are to be delivered to a third person for his sole use, but where it never was in contemplation of the parties that the person to whom the goods were furnished should be in any manner liable for them; this is a case not within the statute, because here the person for whose use the goods were furnished was never liable at all to the

(1) 3 Burr. 1886.

(2) 2 East, 325. 3 Esp. Rep. 86.

(3) Goodman v. Chace, 1 Barn. & Ald. 297.

(4) 1 New Rep. 127.

(5) 7 T. R. 201.

(6) 1 Burr. 373.

(7) Stephens v. Squire, 5 Mod.

205. See also Read v. Nash,

1 Wils. 305. Ld. Raym. 1085.

3 Burr. 1886. 2 Wils. 308. S. C.

1 Esp. 162. Comb. 362. 1 Barn.

& Ald. 297. 2 East, 325. Amb.

330. 1 Salk. 25. Ld. Raym. 759.

S. C. 1 Salk. 28.

vendor (1). Where a party buys goods, or incurs any other liability jointly with another, though for the sole use of such other, the bargain does not come within the statute (2). So if A. promise that C. will pay such a sum, A. is the principal debtor, for the act done was on his credit, and not upon the credit of C. (3) On examination it will be found, that in order to determine whether promises of the preceding nature are within the statute of frauds or not, it is necessary to take into consideration to whom it was understood by the parties that the vendor or other creditor should look for payment in the first instance, also the particular expressions used, and the particular situation and circumstances of the parties at the time of his promise (4). We have already seen as to what will amount to a sufficient memorandum or note of the agreement to bring the case within the statute (5); the consideration of the guarantee must be stated either formally, or by words from which it must necessarily be implied. (6)

Form of the
guarantee.

How guarantee
construed, and to
whom it enures,
and its duration.

The same rules which govern the construction of all contracts will regulate the construction of guarantees; but it is said that the courts are always inclined to favour sureties, and will never go beyond the strict letter of the contract (7). The language of the security, the nature of the transaction, and the understanding between the parties at the time of entering into it, must be all taken into consideration (8); an engagement to indemnify "and save harmless," obliges the one to save the other from incurring any expence, &c. and not merely to reimburse him when incurred (9); a bond to five, to indemnify them or any of them, for advances made by them as bankers, does not extend to advances by four survivors (10); and a guarantee to B. does not extend to a new firm created (11), or a new credit (12) given after the guarantee. A guarantee for the payment of goods sup-

(1) 2 T. R. 80. 1 Salk. 27.

(2) 2 Hen. Bla. 235. *Hampsen v. Merriott*, Feil, 27, note b.

(3) *Jones v. Cooper*. *Cooper* 227. *Roberts on Frauds*, 210, 223. *Watkins v. Perkins*, 1 Lord Raym. 224.

(4) *Fell*. 25. See 1 Bos. & Pul. 158.

(5) *Ante*, 277. 290.

(6) *Ante*, 279.

(7) 2 T. R. 370. 1 Stark. 193.

(8) 3 Maule & Selw. 502.

(9) 8 East. 593.

(10) 4 Taunt. 673. See 2 Bla. 934. 3 Wils. 530.

(11) 3 Campb. 53. 3 East. 484. 2 Maule & Selw. 363. 2 Bla. 934. 3 Wils. 530.

(12) 3 Campb. 220.

plied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, and then supplied on the credit of the guarantee (1). A party, having contracted to guarantee a bill to be drawn for a specific sum, is not liable, even to the extent of that sum, on a bill which exceeds it (2); but a limited guarantee for monies lent to the amount of £200 is not discharged by monies lent above that sum (3). The recitals in an indemnity bond, or any other guarantee, may be allowed to explain and restrain the extent of a party's liability thereon (4). A bond reciting that A. had taken a house in the parish for a certain term, and conditioned to indemnify the parish against any charges resulting from A.'s becoming an inhabitant, continues during his inhabitancy, (whether in the same house or not) though beyond the term (5); and where, from the terms of the condition, a mere continued employment seemed to have been meditated, and no specific time was limited, yet it appearing that the office for which the security was given, was an annual office, the court held the security at an end at the expiration of the first year (6). The usages of trade will, in the absence of an express contract, be allowed to explain the meaning and extent of a guarantee; and in a guarantee for payment of goods sold, though no period of credit to the third party is specified in it, yet it will not be for an unlimited period, but is restrained by the usual course of trade; and a guarantee of a debt generally, without saying how much, is valid. (7)

Frequent questions have arisen as to what will amount to a subsisting or *continuing* guarantee. Where the defendant engaged in writing to guarantee the plaintiff, "for any goods he hath or may supply my brother W. P. with, to the amount of £100," the court held it a continuing or standing guarantee, which might at any time become due for the goods supplied, until the credit was recalled; and that the meaning of it was, that the defendant would be answerable, at all events, for goods

When continuing.

(1) 2 Stark. 426. As to what will amount to a guarantee for a future loan, see 8 Taunt. 208. 403, 411. All. 10. Park. 277. 6 East. 507. 2 New Rep. 175. 1 T. R. 287. 291.

(2) 2 Taunt. 206. 6 T. R. 200. 2 Hen. Bla. 163.

(3) Hall v. Grose, MSS. Trin. Term 1814.

(4) 4 Taunt. 593. 2 Saund.

(5) 1 Maule & Selw. 120.

(6) 2 New Rep. 175., and see

2 Maule & Selw. 363. 5 Maule & Selw. 166.

(7) 15 East. 272.

supplied to his brother to the extent of £100 at any time, but that he would not be answerable for more than that sum (1); and so where a guarantee stated, that the defendant had been applied to by his brother W. W. to be bound to plaintiffs for such debts as he might contract with them, and then added, "I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding £100, after this date," it was decided that the defendant was answerable for any debt not exceeding £100, which W. W. might from time to time contract with plaintiffs in the way of his business; that the guarantee was not confined to one instance, but applied to debts successively renewed (2); but a guarantee of the payment to A. B., "to the extent of £60 at quarterly account, bill two months, for goods to be purchased by him of the plaintiff," is not a continuing or standing guarantee to that extent for goods, to be at any time supplied to A. B., until the credit is recalled (3). So a guarantee for payment for coals to the amount of £50, which defendant would be answerable for at any time, is not a continuing guarantee. (4)

How discharged
or released.

It is a general rule of law, that any act of the party to whom the promise or guarantee is given, which tends to increase the risk of the promiser, or defeat his remedy against the principal, shall vacate and discharge the guarantee. Therefore where a creditor discharges, or gives time to the principal debtor without the consent or knowledge of the surety, so as to deprive the surety of the power of suing the principal, or otherwise varies the nature of the security, the surety shall be discharged (5); and this rule applies, both at law and in equity, in the case of contracts not under seal (6). The principle is, that the creditor by these acts precludes himself from suing the original debtor to the prejudice of the surety, the original debtor being

(1) 12 East. 227. 2 Campb. 436.

(2) 2 Campb. 413.

(3) 3 Barn. & Ald. 593., and see 2 Maule & Selw. 18.

(4) 2 Chitty's Rep. 205.

(5) Holt C. N. P. 84. 2 Bro. Ch. C. 579. 581. 6 Ves. 809. 2 Ves. 542. 2 Bos. & Pul. 61. 3 Bos. & Pul. 366. 3 Bro. Ch. C. 1. 2 Campb. 185. Dougl. 247. 3 Merival. 272. 1 Taunt. 159. 3 Leon.

159. Cro. Eliz. 396. 5 Barn. & Ald. 191. 4 Ves. 824. 5 Dow. 234. Chitty on Bills, 6ed. 291, &c.

(6) Id. 1 Vern. 196. 2 Vern. 393. Holt C. N. P. 403. Note id. 84. But more extensive relief may be obtained in these cases, by surety applying to a court of equity for relief. In equity, the court can direct the security to be given up.

thereby rendered less active in his endeavours to satisfy the debt, than he probably would otherwise be, if he continued liable to an immediate action at the suit of the creditor (1). But in courts of law, in order to discharge a surety on account of time given to the principal debtor by the creditor, or any other act done to the prejudice of the surety, the agreement to give time, or act of the creditor, must be such as in point of law will amount to an absolute estoppel to the creditor's remedy over against the original debtor, either absolutely or for a time, and it is no defence therefore to an action on a bond against a surety, that by a parol agreement time has been given to the principal (2); and in the same case the court of equity afterwards refused to relieve, it appearing that what the creditor had done was not prejudicial to the surety. But courts of equity, deciding upon equitable principles, will in these cases sometimes, and when the surety has really been prejudiced, grant relief; and it has been there decreed, that if the obligee of a bond with a surety, without communication with the surety, takes notes from the principal, and give further time, the surety is discharged (3); and if the grantee of an annuity give time to the principal, he thereby discharges the surety from past as well as future arrears (4). The taking of a bond, or any security payable at a future day, from the acceptor of a bill, or maker of a note, without the assent of the other parties thereto, would discharge them from liability (5). So bail to the sheriff are discharged by the defendant's giving a cognovit for payment of debt and costs, at a time longer than the usual proceedings in an action would occupy (6); and the taking a fresh security from the obligee, thereby waiving and discharging the original one

(1) 4 Maule & Selw. 232. 2 Ves. 540. 6 Ves. 805. 3 Atk. 91. Bac. Abr. Obligation, and id. 7 vol. tit. Obligation, 506. 2 Bos. & Pul. 62. 3 Mod. 87. 2 Marsh. 383. 5 Taunt. 614. 10 East. 40. 15 East. 617. 7 Taunt. 54. 3 Bos. & Pul. 366.

(2) 5 Barn. & Ald. 187. Holt 84.

(3) 2 Ves. 540. 6 Ves. 805. 3 Atk. 91. 2 Bro. C. C. 579.

(4) 3 Madox, 221. 6 Ves. 809.

(5) 3 Mod. 87. Chitty on Bills, 6 ed. 292. and cases there col-

lected. 2 Bos. & Pul. 61.

(6) 4 Barn. & Ald. 91. Courts of law exercise a jurisdiction over bail and replevin bonds, upon special applications founded upon affidavits; and they will see that no improper use is made of these instruments, and under circumstances will discharge surety, though only parol agreement for time, &c. be given. See 1 Taunt. 159. 15 East. 617. 4 Taunt. 446. 5 id. 319. 6 id. 382. 2 Brod. & B. 107. 7 Price, 223. 8 Taunt. 28.

in equity, (though not pleadable at law), discharges also the surety, who is entitled to the benefit of all transactions between the creditor and his principal. (1)

But the mere change or addition of securities, without expressly relinquishing the original debts, nor suspending for a time the creditor's right of action, will not, either at law or in equity, discharge the surety (2); and the obligee of a bond with a surety, accepting a composition merely on an additional *security*, reserving a remedy over on the original bond, does not thereby discharge the surety (3), and a composition with the principal, reserving the remedy for the remainder against the surety, does not discharge the latter (4); so a creditor may compound with or give time to a surety, or take security from him, without discharging the co-sureties or principal (5); and it is no answer to a claim on a contract of indemnity, that the party is entitled to an indemnity from another quarter. (6)

A surety will sometimes be discharged in equity, though not at law, as, where from the gross negligence of the party indemnified, he is lulled into a false idea that the debt or undertaking of his principal has been discharged or fulfilled. In the cases of bills of exchange and promissory notes, notice of the non-acceptance or nonpayment thereof must be given within a reasonable time, usually the next day, to the drawer and indorser (7). Where a party taking a security for the fidelity of another, covenants with the surety to act in a certain way for his protection, and omits to do so, such omission will in equity discharge the surety (8). But where the defendant had by deed been bound for the fidelity of his son, and having been once called upon to pay, had written to the plaintiffs requesting them not entrust the son with cash, he was still held liable to answer for his son's embezzlement of cash, subsequently entrusted to him (9). And the neglect of a party to look with sufficient attention into the accounts of a person in his em-

(1) 18 Ves. 20. 3 Atk. 91.	& Ald. 210. 1 Morre, 2.
(2) 18 Ves. 20. 5 Dow. 234.	(6) 6 T. R. 413.
Hamilton v. Stratton, MSS. 9 July 1819.	(7) 3 Taunt. 130. 16 East. 43.
(3) Id.	Chitty on Bills, 197. 309., and see post.
(4) Id.	(8) 2 Vern. 518.
(5) 1 P. Wms. 237. 6 Ves. 734.	(9) 2 P. Wms. 288.
Holt, 399. 6 Price, 111. 2 Barn.	

ployment, for whose fidelity he has taken security, is not such a laches as will discharge the surety at law (1); and where A. guaranteed B. on account of goods to be furnished to C., and was himself guaranteed by D., and A. afterwards wrote to B., to know whether the goods were furnished, received no answer, (B. having gone abroad), and thence supposing they were not, discharged B. from his guarantee; it was held A. was still liable to B., the goods having been in fact sent (2); and in general the neglect of the obligee to give notice to the surety, that the principal had made default, does not discharge such surety (3); and delay in calling upon a guarantee does not exonerate him, unless it be very gross, and the surety is injured thereby (4); and there is no obligation in the creditor to use *active* diligence to sue or enforce the liability of the original debtor, he may forbear to do so as long as he chooses; if however he does proceed, and afterwards gives time, the surety will have the benefit of that indulgence (5), and giving reasonable credit to the party, whose solvency or fidelity has been guaranteed by another, does not discharge the latter. (6)

It has been considered in equity, that if the creditor part with any lien, or other legal means which he may have in his hands, of reimbursing himself, the surety or guarantee will not be liable (7); but it must be the parting with something actually in the power and possession of the party, and not the consenting to waive the receipt of a payment or security never in his actual possession. (8)

If any alteration be made in the instrument of guarantee, without the concurrence of the surety, he will be thereby discharged (9); and a surety may be discharged by operation of law, as where he becomes the partner or husband of the obligee or party guaranteed (10); but a surety, though once discharged, may yet render himself again liable upon any subsequent promise. (11)

(1) 10 East. 34.

(2) 2 Hen. Bla. 613.

(3) Holt, C. N. P. 84.

(4) 1 Bos. & Pul. 419. 10 East. 153.

(5) 6 Ves. 734. 18 Ves. 20. Holt, 399. Chitty on Bills, 6 ed. 292.

(6) 1 Bos. & Pul. 419.

(7) 4 Ves. 824.

(8) Prac. in Chan. 178. Fell,

(9) See ante, 140. 5 Maule & S. 223. 3 Atk. 91.

(10) 2 Moore. Rep. 393.

(11) 1 Wils. Ch. Rep. 418.

How far a surety
may be relieved,
1st. By party
guaranteed or
indemnified.

Courts of equity will, under circumstances, impose some terms on the creditor, with a view to relieve the surety from his engagement, or to protect him from any risk. Courts of law and equity are inclined to favour sureties; thus a surety may, by application to the court of chancery, compel the creditor to take proceedings against the debtor, for enforcing payment of the debt (1), or if an additional security, which the creditor holds from the debtor, turn out defective, a further valid one will be decreed to be given (2); but a surety in a bond, in order to take proceedings thereon against the original debtor, in the name of the obligee, cannot insist upon an assignment of it to him, either upon tender of payment or upon actual payment (3), though there seems a decision to the contrary (4). In case of the principal's bankruptcy, where the surety has no absolute counter-security, he could not, before the 49 Geo. 3. c. 121., come in as a creditor directly in his own right, if he had not proved, until after the bankruptcy of the principal (5); yet if the creditor had proved the *whole* debt, before he called upon the surety, the court would direct that he should stand as a trustee for the surety, and allow the latter (or in case he too has become a bankrupt, and his estate has paid dividends on account of his principal, would allow his assignees) to have the benefit of the principal creditor's proof, and to receive dividends upon it, provided the creditor be not thereby prejudiced, and so that no more shall be paid than 20s. in the pound upon the whole debt (6); and a court of equity, on a bill filed for that purpose, has ordered the creditor to go before the commissioners, and prove his debt for the benefit of the surety (7), and stayed his proceedings at law against the surety until he had done so (8). An accommodation acceptor of a bill is entitled to the same benefit of proof (9), and where a surety, previous to the proof by the creditor, under the commission against the principal, had lodged the amount of the debt with a banker in trust for the creditor, the surety has been permitted to re-take the money, for the purpose of enabling the creditor to prove against the

(1) Fell, 158. 2 Bro. C. C. 579. 582. 2 Ves. 542.

(2) 2 Vern. 11.

(3) 1 Ves. 339. 251.

(4) 13 C. 1. Ch. R. 120.

(5) Chitty on Bills, 6 ed. 448. 453. 1 H. Bla. 640.

(6) 2 P. Wms. 88, 9. 1 Atk. 129. Cooke, 210. Cullen, 156. 1 Mont. 135. 158, 9.

(7) 6 Ves. 734. Cooke, 210,

211. Cullen, 156. 1 Mont. 135.

159. 10 Ves. 412. 414.

(8) Cooke, 211. Cullen, 156.

(9) 10 Ves. 417. 3 Ves. 243.

principal (1); where, however, a banker having money of the bankrupt in his hands, paid it after notice of the act of bankruptcy, though to creditors whose debts were antecedent, and who would have been entitled to prove under the commission, yet he will not be permitted to stand in the place of those creditors so paid, and to receive dividends thereon with the other creditors (2). If the drawer of a bill take up and pay the whole, after the indorser has proved it under the commission against the acceptor, the drawer has an equitable right to the benefit of the proof made by the indorser; if the payment by the surety be after the bankruptcy of the principal, and before the creditor has proved the debt, it cannot be proved either by the creditor or the surety; the creditor cannot in such case prove, because his payment is after the bankruptcy (3). It is therefore in general advisable for an accommodation party to compel the holder of the bill to prove before he pays him the amount. When such proof has been made, and in consequence of the party proving, having afterwards received his debt from the surety, such proof has been expunged, it may, in some cases, at the instance of the surety, be re-instated for his benefit (4); but the creditor cannot be turned into a trustee for the surety, to the prejudice of any right the former may have against the principal debtor's estate, on a further and distinct demand; and in such case the surety will only be allowed such part of the dividend as will remain after allowing out of it to the creditor as much as will make up the proportion which he would have received upon the residue of the debt proved, beyond the debt to the surety, if this debt had been expunged (5); but this doctrine has been qualified, and it has been held, that bankers, who had proved their whole demand against the principal, beyond the amount of their claim on the surety, who had guaranteed advances to that extent, were bound, upon payment to them by the surety of their whole demand on him, to give him the whole benefit of their proof to that extent against the principal, on the ground that it is not competent to such bankers to go on giving an enlarged credit to such principal, without the concurrence of the surety, so as to prejudice his equitable right to the benefit of their proof (6).

(1) Cook, 210. 1 Mon. 135. (5) 3 Ves. 243. Cullen, 157.

(2) 3 Bro. 363. Cullen, 158, 9. n. 56. 10 Ves. 415. 418. 12 Ves.

(3) 6 Ves. 285. 734. 1 Mont. 437.

135. 147. Cooke, 152. (6) 10 Ves. 409. 422.

(4) 6 Ves. 285.

So it has been held, that a surety for indemnity to a limited amount, having paid to the extent of his engagement, is entitled to dividends, upon proof by the creditor under the bankruptcy of the principal debtor, subject to a deduction of the proportion of the dividend, upon the residue of the debt proved beyond that for which the surety was engaged, supposing that expunged (1). The surety, however, is not entitled to the benefit of the proof made by the creditor against other estates, upon a distinct security, with which the plaintiff had nothing to do (2); with respect to what sum, or to what extent proof may be made, or the proportion of the dividends received by the surety, it seems that the amount should be such a proportion of the whole money paid by the surety, as should not prejudice the right of the creditor whose debt was secured, but leave him in the same situation, as if the debt secured to him had been expunged (3). The statute 49 Geo. 3. c. 121. sect. 8., which we shall hereafter consider, has relieved sureties from many difficulties, in case of the bankruptcy of the principal.

2d. Against the principal.

As against the principal, the surety it seems has a more extensive relief, where he has paid money in discharge of a bond, or other guarantee entered into by him for his principal, or be otherwise damnified, though he have no counter-security, he may yet recover it back again from the principal, and obtain relief, either in a court of law or equity (4); for where the surety has taken a counter-security from the principal, he must resort thereto for his remedy, and cannot bring an action for money paid (5). It may be questioned how far a surety, being called upon to pay, who in lieu of payment gives a security to the

(1) 12 Ves. 435.

(2) *Id.* *ibid.*

(3) Cullen, 157. note 56. 12 Ves. 433. 10 Ves. 409. Any difficulty in these cases is put an end to, in the cases when a surety proves under the provisions of the 49 Geo. 3. c. 121., the wording of which seems to give the surety the benefit of the proof upon the whole sum which he has paid, or is liable to pay. Fell, 164.

(4) 2 T. R. 104. Esp. N. P. 96. 1 Vernon, 456. Com. Dig. Chancery, 4 D. 6. 1 Vern. 456.

Cowp. 525. 8 East. 242. 3 Wils. 262. 346. Parties taking up bills for honour of drawer, or accepting. &c. accommodation bills, may in general support this action, 1 Esp. 162. 1 T. R., 269. Chitty on Bills, 130, &c. As to what damages sureties may recover, see 3 Wils. 13. 1 Atk. 262. 3 East, 168. 8 East, 593. A surety, by paying a specialty debt, thereby becomes a specialty creditor to principal, 2 Mad. 434.

(5) 2 T. R. 100. 7 T. R. 565. 3 East, 72.

creditor, can recover against the principal as for money paid to his use before actual payment; the better opinion seems to be, that he cannot (1). If an agent has accepted bills, for the accommodation of his employer, he may in some cases retain money in his hands to discharge it, unless the bill be delivered up to him, or be otherwise sufficiently indemnified (2); and where a sum of money has been lodged with a party, to indemnify him against bills of exchange he has accepted for the accommodation of the latter, an action will not lie against him to recover the money while the bills are outstanding, though the statute of limitations has run upon them (3). In equity, a surety frequently may compel the principal to relieve him of his liability, by paying off the debt after it has become due (4). If the principal have given bail, in an action for a debt with surety, the surety, after paying the debt, has the same remedy in equity against the bail as against the principal (5). If the principal absent himself abroad, the court of Chancery will interfere to give equitable relief to the surety, from the property of the principal. (6)

If at the time the principal becomes bankrupt, the surety has in his possession, or under a controul equivalent to possession, property of the principal, as agent, bailee, or otherwise, upon which he has a lien for his general balance, it seems he has also a lien upon it for the amount of the sum for which he is surety (7); and where a person who has funds in his hands belonging to another, or is otherwise indebted to him, accepts a bill for his accommodation, and the drawer afterwards commits an act of bankruptcy, or becomes insolvent, such acceptor may retain the funds or debt until the bill becomes due, as an indemnity against his liability as acceptor (8); and where the principal becomes bankrupt, the remedy of a surety actually paying his debt is to prove the amount of such payment under the commission; and where the surety holds a counter-security, he will be allowed to prove immediately on such counter-security, though the debtor becomes a bankrupt, before such security is payable, and before the surety himself has paid or

Relief against principal, where he becomes bankrupt, where surety has counter-security.

(1) *Fell*, 167. 3 *East*, 169. 1 189, 190.
East, 98. acc. 2 *Esp.* 571. 1 *H.* (5) 2 *Vern.* 608. 11 *Ves.* 23.
Bla. 239. Ante. (6) 11 *Ves.* 23.
(2) 1 *Camp.* 12. 11 *Ves.* 407. (7) *Cowp.* 251.
(3) 3 *Camp.* 418. (8) 7 *T. R.* 711. 12 *East*, 659.
(4) 3 *Merival*, 579. 1 *Vern.* 11 *Ves.* 407. 1 *Camp.* 12.

been called upon, or even could, by the terms of his engagement, be called upon to pay to the creditor (1); and this, though the counter-security has been negotiated by the party, and returned to him after the bankruptcy (2). The principle of the case is founded on the ground that such counter-security creates an absolute debt at law. With a view, however, to prevent the injury which might be done to real creditors, by allowing such constructively absolute but really contingent creditors to receive dividends upon debts which may never exist but in *law*, it has been thought necessary, where there are cross demands between the surety and the bankrupt upon counter paper, as it is called, and upon which, till either has actually paid, they are substantially only sureties, though nominally creditors of each other, to suspend the dividends till it appear what the surety actually pays, and how far he exonerates the bankrupt's estate from his own paper. A security of this nature must be a bond, bill, note, or other instrument, payable at all events, and not a mere parol or written undertaking to indemnify (3). It is not necessary in all cases, that this security should be given expressly as an indemnity. (4)

Where surety
has no security.

Where a party, who has become a surety, has no security in his hands to indemnify him, yet, if he has paid the debt before the act of bankruptcy of his principal, it is provable under the commission (5); but if he has paid such debt after the act of bankruptcy of his principal, he cannot in general prove under the commission, unless he can avail himself of the provisions of the 49 Geo. 3. c. 121. s. 8. This statute enacts, that in all cases of commissions of bankruptcy already issued, under which no dividend has yet been made, or under which the creditors who have not proved can receive a dividend equally in proportion to their respective debts, without disturbing any dividend already made, and in all cases of commissions of bankrupts hereafter to be issued, where at the

(1) Cooke, 157. 2 H. B. 570. Campb. 12. 12 East, 659. 2 East, 227. S. C. Cullen, 133. 134. 1 Mont. 131, 132. 134. 153. 157, 158.

Chitty on Bills, 445.

(2) 7 T. R. 570.

(3) 3 Wils. 528. 3 Wils. 13. Cullen, 131. 138. 1 Mont. 156. 158. Cooke, 159. 7 T. R. 489. 7 T. R. 364. 11 Ves. 404. 1

(4) 8 Ves. 531. Bayley, 205. Chitty on Bills, 447.

(5) Cullen, 129. 1 Mont. 131. 153. 13 East. 427. See Chitty on Bills, 447. to 450. and cases there collected.

time of issuing the commission, any person shall be surety (1) for, or be liable for any *debt* of the bankrupt, it shall be lawful for such surety or person liable, if he shall have paid the *debt* (2), or any part thereof, in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to dividends upon such proof; and when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends (3), and to receive a dividend or dividends proportionably with the other creditors taking the benefit of such commission, notwithstanding such person may have become surety, or liable for the debt of the bankrupt, after an act of bankruptcy had been committed by such bankrupt; provided that such person had not, at the time when he became such surety, or when he so became liable for the debt of such bankrupt, notice of any act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment; provided always, that the issuing a commission of bankrupt, although such commission shall afterwards be superseded, shall be deemed such notice, and every person against whom any such commission of bankrupt has been or shall be awarded, and who has obtained or shall obtain his certificate, shall be discharged of all demands at the suit of every such person having so paid, or being hereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, in regard to his debt, in respect of such suretyship or liability, in like manner, to all intents and purposes (4), as if such person had been a creditor before the bankruptcy of the bankrupt, for the whole of the debt in respect of which he was surety, or was so liable as aforesaid. Upon this statute, it has been decided, that an accommodation acceptor is a person liable

(1) In 2 Camp. 186, it was considered that an accommodation acceptor was in the nature of a surety for the drawer.

(2) As to what may be considered as a *debt*, see 1 B. & A. 495. 5 B. & A. 12. 3 B. & A. 325. Surety under an annuity deed cannot prove, 3 B. & A. 186. nor can bail, 4 B. & A. 493. and a

partner is not a *surety*, but he is a *party liable* within the meaning of the act, 3 Ves. & B. 31. See 2 M. & S. 195.

(3) This means not compelling the creditors to refund any part of the dividends received. See 12 East, 664. 1 Scho. & Lef. 242.

(4) Means a general insolvency, 1 Camp. 492. in notes.

for the debt of the bankrupt drawer, and may prove under his commission (1); and if an acceptance for the accommodation of the drawer of a bill be given before, and renewed after he has committed an act of bankruptcy, such renewal is a continuation of the same suretyship, and therefore, if a commission of bankruptcy be issued against the drawer, and the accommodation acceptor afterwards pay the bill, he will be entitled to prove the amount under such commission, though, before the renewal of the acceptance, he had notice of such act of bankruptcy having been committed (2); nor will the case be varied in principle by the circumstance of the holder of the first bill having, before the renewal, given time to the drawer, or by that of an additional name, as that of an indorser, having been lent upon the second bill (3). And it has been decided, that if an accommodation acceptor having paid the bill, afterwards sues the drawer as for money paid, and having obtained judgment, assigns the judgment debt to a third person, such assignee of the debt may prove the original debt under the commission against the drawer, and the judgment debt, though greater than the original debt, will be barred by the certificate (4). So where a bill after proof under a commission against the acceptor was paid by the drawer, and he, after a dividend, arrested the bankrupt for the balance, and was also a surety for him on another bill, the chancellor made an order, that the bankrupt should be discharged, and that the plaintiff should be restrained from lodging any detainer under the above statute, 49 Geo. 3. c. 121. s. 8. & 14. (5) A partner is considered as a person liable for the joint debt of himself and his copartners, and if the latter become a bankrupt, and the solvent partner be afterwards obliged to pay the whole debt, the certificate of the bankrupt partner will protect him from liability to make contribution to such solvent partner (6). But there are not any words in the statute 49 Geo. 3. c. 121. s. 8. compulsory upon the party to prove, or precluding him from suing the bankrupt, subject to such action being rendered ineffectual by his obtaining his certificate, and therefore the drawer of a bill, or any other surety who has paid the amount of the bill or debt to the holder or creditor, after a commission of bankruptcy issued against the acceptor or his principal, may sue the acceptor or

(1) 3 Ves. & B. 40.

(4) 1 Rose, 4.

(2) 13 East, 427. 12 East, 664.

(5) 17 Ves. 334-5. 1 Rose, 219.

(3) *Id.* *ibid.* Bayley on Bills, 200.

(6) 2 Maule & S. 195. 2 Rose, 47. 3 Ves. & B. 31.

his principal before he has obtained his certificate, and arrest him, notwithstanding the holder or creditor has proved the bill or debt under the commission. (1)

As to the extent to which the surety is entitled to recover or prove, it seems he may recover the principal money paid and interest, and if the debt paid by him arise out of a bond, of which he takes an assignment for his own benefit, he shall recover the whole penalty if he has been damnified to that amount (2). When the demand of a principal or surety arises from an instrument securing an annuity, the Court of Chancery will set a value upon the annuity when it is less than the amount of the penalty, in the same way as is done by commissioners on bankruptcy. (3)

When two or more persons become surety for another, and one of the sureties pays the debt of his principal, he may compel the others to contribute to him his aliquot portion of the money so paid (4). But where a party, at the instance of another, is induced to become a co-surety with him for the debt of a third person, and the party at whose request the other entered into the security is forced to pay the whole debt, he cannot recover a moiety thereof from the other (5). A surety in an indemnity bond may bring an action for contribution against his co-surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of his co-surety (6). It is said, that a surety paying the debt cannot *at law* recover from his co-sureties more than their aliquot shares, to which they were originally liable; but that courts of equity, however, relax upon this rule, and frequently, where one of the co-sureties becomes insolvent, will compel the others to contribute a larger than their aliquot portion (7); and on account of the difficulties and inconveniences in proceeding at law, a court of equity is usually resorted to in these cases for relief. In cases where there are two or more sureties, and one or more of them become insolvent,

Remedies by one
surety against
another surety.

(1) 3 Maule & S. 91.

(2) 14 Ves. 567.

(3) Id. *ibid.* Fell. 178.

(4) 2 Term Rep. 105. 1 Roll.

Ab. 20 pl. 15. Roll. Rep. 354.

3 Bulstr. 162. Jenk. 324. pl. 27.

S. C. 2 Bos. & P. 268. Id. 270.

S. P. Godb. 243. 1 Vern. 458.

(5) 2 Esp. 478.

(6) 1 Moore, Rep. 2.

(7) Fell on G. 181. 2 Bos. & P. 270. See 1 Wilson, Ch. Rep. 418.

the party or parties paying shall have contribution in equity against such of the other sureties as remain solvent, in the proportion which would be left after striking out the names of such as are insolvent (1). If two are jointly bound, and one dies, equity will decree his representative to be charged *pari passu* with the survivor (2); and it makes no difference in the relation among sureties, if any or all become so by separate instruments (3). But in such case the proportion in which the parties shall be liable to contribute is to be ascertained by the sums for which they have respectively made themselves liable (4). But when a bond is given by a party as a further security, in case those already given should be insufficient, then he shall not be called upon to contribute. (5)

Letters of credit.

There is one description of guarantee, or security for money or goods to be advanced to a third person, which has received amongst merchants the peculiar denomination of *letter of credit*, and which prevails principally in foreign commerce, and is exceedingly useful therein. Travellers or merchants going abroad on business generally take letters of credit in place of money, by which means they avoid the risk and trouble of carrying specie, and are always supplied according to their wants in the coin of the country into which they go. This is where a merchant sends or authorizes a third person (either here or abroad), to buy some commodities, or to take up money for some purpose, and delivers unto him an open or sealed letter directed to another merchant or merchants, requiring him or them, that if such third person, or the bearer of the letter, have occasion to buy commodities, or to want money to any particular or unlimited amount, that he will either procure the same, or pass his promise, bill, or bond for it, on the writer of the letter undertaking therein that he will provide him the money for the goods, or repay him by exchange, or give him such satisfaction as he shall require, either for himself or the bearer of the letter (6). These letters are either general or special, the former is directed to the writer's

(1) Peter v. Rule, 5 C. 1. Ch. R. 35. Fell. 182. acc. Swain v. Wall, 17 C. 1. Ch. R. 150. Com. Dig. Chancery, 4 D. 6. cont.

(2) 1 Atk. 89.

(3) 14 Ves. 28. 161. 2 B. & P. 270. Fell. 185.

(4) Id. ibid.

(5) 14 Ves. 161.

(6) See Malyn, 76. 1 Beawes, 607. Jac. Dic. tit. Letter of Credit. Montef. tit. Credit, Letters of. See form of letter of credit, post, 4 vol.

friends, or correspondents generally, where the bearer of the letter may come, (though it is not customary to give separate letters to each place), and the letter is directed to some particular person.

Upon the bearer's shewing either of these letters, the party to whom it is directed will either conform to the request contained in it, or reject performing it: if the party to whom the letter is directed comply with the writer's request, the latter is immediately bound to fulfil his engagement; if therefore bills of exchange be tendered to him, he must accept and pay them, and in case of refusal, he may be compelled thereto, rather than the drawer, as the furnisher of the goods, or the remitter in the loan of his cash, had more regard to his correspondent's sufficiency than the drawer's, whom it is probable he knew nothing of; therefore in this respect the person giving the credit is to be reputed as the drawer of the bills: the party to whom the letter is directed, if he comply with the request of the other, should keep the letter for his assurance or security, and as available against the writer thereof. If the merchant to whom the letter of credit is directed should think fit not to fulfil the request contained in the letter, the bearer should keep the letter, and return it to the giver without any other proceeding, unless, indeed, the merchant to whom the letter is directed is a debtor of the merchant who gave the letter, in which case the bearer of the letter should take witnesses of the merchant's refusal to comply with the request in the letter, and with a scrivener or notary make a protest against him, protesting to recover of him (by all lawful and convenient means) all the damages, charges, and interest which he or any other should sustain thereby, by reason of the non-performance of the said letters of credit, and that in time and place as occasion shall require, which protest is sufficient evidence to recover such damages; but if the party to whom the letter is directed make a reasonable answer or excuse for not performing the request contained in such letter, and requires the scrivener or notary to put down the same in the act or instrument of the said protest, then the cause of refusal will be considered, and the losses and damages may fall upon the party giving the letter; for if the giver of the letter were a debtor to the other that receives it, to be paid thereby either in goods or money, then the protest will be sufficient evidence for the receiver to recover his

damages of the party who gave it (1). Advice by post should always follow a letter of credit, and a duplicate of it accompany such advice; and it would be prudent therein to describe the bearer with as many particulars as possible, for fear he should lose or be robbed of his credentials, and a stranger reap the effects of them. (2)

Of remedies for
deceitful repre-
sentation of
character.

The statute of frauds does not apply where a person, with a design (3) to deceive and defraud another, makes a false representation of matters inquired of him, in consequence of which, the person to whom the representation is made, being ignorant of the truth (4), enters into a contract and thereby sustains an injury; an action on the case in the nature of deceit will lie, at the suit of the party injured, against the party making the fraudulent representation, although a stranger to the contract from the entering into which the plaintiff was damnified (5); and therefore if a man asks, whether he may trust A., and the answer is that he may, the person giving that answer knowing at the time that A. ought not to be trusted, must pay in damages for the consequence of such misrepresentation; and a court of equity, as well as a court of law, will in some cases compel him to make retribution (6). And where A. fraudulently represented the circumstances of B. to be good, in order to induce C. to give him credit, and added verbally, "if he does not pay for the goods, I will," an action may (notwithstanding the addition of the promise, which was void by the statute against frauds) be maintained against A. for the misrepresentation (7). In general, the misrepresentation must be an actual answer to the question put, in order to charge a party, and it must be calculated to mislead a man of ordinary sense; as if a man asks whether *he* may trust A., and the party

(1) Malyn, 77.

(2) 1 Beawes, 607.

(3) 2 East, 92. 12 East, 632.
4 Taunt. 488. Holt C. N. P. 387.

(4) If the plaintiff or his agent knew of the insolvency, he could not support any action, 1 Esp. Rep. 290.

(5) 3 T. R. 51. 6 Ves. 386.
3 Ves. & B. 111. 1 East, 328, 9.
Fell on Guarantees. Selw. N. P.
650. In this action, the party

whose credit is misrepresented is a competent witness for plaintiff, 1 Campb. 277. 2 Stark. 47. Evidence of a similar misrepresentation by the defendant to another person, is admissible to shew the fraudulent connection between the defendant and the customer, 3 Esp. Rep. 194.

(6) 3 Ves. & B. 111.

(7) Hamar v. Alexander, 2 New Rep. 211.

giving the answer says, that he has a good opinion of A.'s circumstances, and that he will pay the debt if A. does not, there can be no recovery (1). So if a person, who is asked by a tradesman respecting the circumstances and credit of another, tells him he has been paid a debt due to himself from such person, and that he was ready to give him credit for any thing he wanted; that representation would not necessarily support an action for a deceitful misrepresentation, although such person had before that time been discharged under an insolvent act, and the defendant knew it, but did not mention it (2). In cases of this kind, it is not necessary that the defendant should have derived any advantage from the deceit (3); or that he should have colluded with the person who derives the advantage; but there must be fraud and falsehood (4) in the defendant, in order to support this action (5); for in a case where there was not any fraud or deceit in the party making the representation, although he had incautiously asserted that to be within his knowledge which, in strictness, he could not be said to have known, but had reasonable and probable cause only to believe, it was holden that the action was not maintainable (6). Any material suppression of truth with a fraudulent intent, in answer to questions put, will render a party liable for the deceit (7). In ordinary cases, the person who gives a representation of credit to a third person, is not liable beyond the value of the goods furnished on the facts of the representation, but circumstances may exist, which will render him liable from losses arising from subsequent dealings. (8)

(1) 3 Ves. & B. 112.

(2) 7 Price, 544; but in that case, it appeared that the defendant continued, after the discharge of the party under the insolvent act, to trust him; and see 1 Esp. 442.

(3) 3 T. R. 51. 1 East, 328.

(4) 2 East, 108. 3 Bos. & Pul. 371. Holt C. N. P. 387.

(5) 3 Bos. & Pul. 367.

(6) 2 East, 92. 3 Bos. & Pul. 367. 12 East, 632. 4 Taunt. 488.

(7) 2 Campb. 533. 3 Bos. & Pul. 371. 1 East, 318.

(8) 1 Taunt. 558. 2 Campb. 553. Selw. N. P. 652.

CHAP. VII.

Of Stoppage in Transitu. (1)

Definition and
general nature of
right.

IT frequently happens that, on the sale, or barter or contract of exchange of goods on credit, the purchaser becomes bankrupt or insolvent before he takes possession of the goods; in such cases there exists an equitable right (adopted by courts of law) in the vendor to stop them *in transitu*, or in other words, to prevent the purchaser from taking possession of the goods, and to detain them until the price be paid or tendered (2); for stopping *in transitu* does not of itself rescind the contract of sale, and if the price of the goods be tendered, or the consignee be ready to perform his contract, they may be recovered (3); and if the vendor afterwards offer to deliver them, he may, unless he has resold them, recover the price in an action for goods bargained and sold, which he could not do if, by stopping *in transitu*, the sale was rescinded. (4)

In what cases
the power to stop
in transitu
exists.

This right only exists in contracts for the sale or exchange of personal property where, though the contract is complete, yet something, however trifling, remains to be done by the seller, to complete the delivery to the vendee, and vest in him an absolute property in the goods. The relation of vendor and vendee seems essential to its exercise, but it extends to every case in which the contract is in effect a sale, and the consignor substantially the vendor of the goods (5). It extends also to contracts of exchange, as to an agreement between consignor and consignee, that the latter

(1) See Whitaker on Stoppage in Transitu. 2 Selw. N. P. 1206. Long on Pers. Prop. 176. Abbott on Shipping, 351. Sir W. Scott's judgment, 6 Rob. Rep. 324. Holt C. N. P. 20. in notes. Cullen, Bankrupt Laws.

(2) 2 T. R. 75. 5 T. R. 683. 218. 367. 1 Hen. Bla. 357. 366. 2 Hen. Bla. 211. 1 Atk. 245. 7 T. R. 440. 6 East, 25. 3 T. R. 469. 5 East, 175. 3 Bos. & Pul. 42.

In some cases, where goods have been obtained and got into actual possession of purchaser under co-

lour of a sale upon false pretences, the property is not changed, and the vendor may regain possession by any means short of force, 7 Taunt. 59. Earl Bristol v. Carver, Easter T. 1823 K. B. S P. See 6 Bar. & Ald.

(3) 1 Atk. 245. Co. B. L. 394. 3 T. R. 466. 3 Esp. Rep. 59. 3 East, 585. 6 East, 27. in notes.

(4) 1 Campb. 109. 6 Taunt. 162.

(5) 3 East, 93. 1 Atk. 245. Co. B. L. 394. Amb. 399. 1 East, 515. 3 T. R. 783.

shall return another commodity of equal value in payment, and the fulfilment of which engagement is rendered hazardous by his insolvency (1). The vendor of property, though he purchase the goods of another for commission, may stop them *in transitu* (2); so the consignor of goods for sale, on the joint account of himself and the consignee, may exercise this right, in the event of the bankruptcy or insolvency of the latter (3). But it does not arise between principal and factor, it being a right to revest property, which, in the case of a consignment to a factor, is never divested out of the principal; the only right given to the factor is a lien upon the property after he has obtained it (4); and a person who has a mere lien on goods, without any property in them, cannot, after having parted with the actual possession, repossess himself of such goods while *in transitu* (5). So the mere surety for the payment of the price of goods by the vendee, though he may have accepted bills drawn upon him by the consignee for that purpose, cannot stop them *in transitu* (6). If a party being indebted to another on the balance of accounts, including bills of exchange running accepted by the latter, consigns goods to him on account of this balance, the consignor has no right to stop them *in transitu*, upon B.'s becoming insolvent before the bills are paid (7). If a sale be legalized by licence, and the vendor be an alien enemy, he may stop the goods *in transitu* (8); and any authorized agent of the consignor may exercise the right. (9)

Though the consignment of the goods must be on credit, at least for some part of the price, to entitle the consignor to stop them *in transitu*, yet such right is not affected by the circumstance of a partial payment, or the consignees having accepted bills drawn upon him on account of, and not as actual payment for such goods, though such bills are not due (10), or of the vendor's being indebted to the vendee in part of the value (11); such circumstances indeed will only have the effect of diminish-

(1) *Sittings post Mic. Term*, Guildhall, 1822.

(2) 3 East, 93.

(3) 6 East, 371.

(4) 3 T.R. 783. 3 P.Wms. 185.
1 Atk. 232. 2 Ves. 582. S.C.
Willes, 400.

(5) 1 East, 4. 2 New. R. 61.

(6) 1 Bos. & P. 563.

(7) 4 Campb. 31.

(8) 15 East, 419.

(9) See 1 Camp. 369.

(10) 7 T.R. 440. 64. 3 East,
93. Amb. 399. 2 T.R. 63. 3 T.R.
119. 1 Stark. 115.

(11) 2 Vern. 203. 7 T.R. 440.

ing the vendor's lien *pro tanto* on the goods, when he has regained the possession of them, and not of defeating his right of resuming that possession before actual delivery to the vendee.

This right may be prevented from arising by the peculiar circumstances under which the consignment is made; as where goods are consigned, in pursuance of an agreement between the consignor and third parties, to be applied in execution of certain trusts, in such case the consignor cannot countermand the delivery on the failure of the consignee of the trust, whilst such trusts remain unsatisfied (1). Where goods are consigned to secure a balance due from consignor to consignee, upon acceptances of consignee not due, the goods cannot be stopped *in transitu* by consignor (2); and where goods are consigned in a ship, chartered on the account and at the risk of the consignee, and the bill of lading expresses that the delivery is to his order or assigns, *he or they paying freight for the said goods* according to the charter-party, the goods cannot be stopped by the consignor upon the consignee's refusing to pay the freight, (that being a question between the captain and the consignee) if the consignee offers to accept bills according to his undertaking, and is not in failing circumstances; but if the bill of lading be conditional, and the condition unperformed, the consignor may, under such circumstances, exercise the right of stopping the goods in their transit to the consignee (3); and although goods are delivered to the packers of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they may still be stopped *in transitu*. (4)

It has been observed (5), that stopping *in transitu* is an adverse act, and therefore if it be not done *eo intuitu*, it shall not divest the property of the consignee; as if goods are returned to the vendor by agreement between him and the vendee; and where the agent of the consignees had obtained the bill of lading from the bankrupt after his bankruptcy, upon an agreement when the goods arrived to dispose of them, and to apply the net proceeds in the discharge of such bills as had been drawn against

(1) 1 Bos. & P. 563.

(2) 4 Campb. 31.

(3) 3 East, 585.

(4) 4 Campb. 181.

(5) Ross, 211. Ante, 240.

the goods, it was held that he could not retain the goods so obtained by agreement with the vendee after his bankruptcy against the assignees, there being no adverse stopping *in transitu* (1); but where the consignee of goods, being insolvent and having committed an act of bankruptcy, wrote to the consignor to inform him of his circumstances, and to say that he would not receive the goods, in consequence of which information the consignor obtained possession of the goods whilst *in transitu*, it was considered the consignor might retain possession of the goods (2). And where goods have been seized by the vendors under a claim of a right to stop them *in transitu*, though in point of fact the *transitus* was then at an end, it is competent to an insolvent vendee who has not committed any act of bankruptcy, to give up such goods to the vendors, provided they are given up *bond fide*, and not from motives of voluntary and undue preference (3).

It is necessary that the consignee should become bankrupt or insolvent for vendor to exercise this right (4). If goods be sent by order of the consignee, on his account and at his risk, and the consignor draws bills of exchange on him for the price, and indorses and transmits the bills of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivery, the consignee being willing to accept the bills, and not having failed in his circumstances. (5)

It is not necessary that the vendor, to exercise his right of stoppage, should *actually* take possession of the property consigned by corporal touch; he may put in his claim or demand of his right to the goods *in transitu*, either verbally or in writing; and it will be equivalent in law to an actual stoppage of the goods, provided it be made before the transit has expired (6); and in this respect it appears how much the right of stoppage in vendor is favoured, for such a claim on the part of the *consignee* would not be sufficient to divest the former of his right (7);

In what manner
the stoppage
should be made.

(1) 6 East, 371.

(2) 2 B. & P. 457. Cowp. 125.
1 Stra. 165. 3 East, 93. 1 Atk. 250.

(3) 5 East, 175.

(4) 6 Robinson Ad. R. 321.

(5) 3 East, 585.

(6) 2 B. & P. 457. 462. 2 Esp.

R. 613. Co. B. L. 494. 1 Atk. 245.

Ambl. 399. 1 Esp. R. 240. 3 East,
394. This right may be exercised
by making out a new invoice or
bill of lading, Holt C. N. P. 338.

(7) 2 Esp. 613. 5 East, 175.

14 East, 308.

but the consignor must put in his claim, and endeavour to get the property in some shape or other; the mere bankruptcy or insolvency of the consignee is no countermand of the delivery to him (1). It has been said, that the vendor may effect the stoppage in any manner short of felony or absolute violence; but, as lately observed by a high authority, this is a rule of a dangerous extent, and cannot safely be acted upon (2). An agent expressly authorized for the purpose, or a general agent not particularly authorized, (if the act of the latter be afterwards recognized and confirmed by his principal,) may effectually stop goods *in transitu*, and he may do it in the same manner as his principal might (3). But the party must in some degree be an agent of the vendor's at the time of his stopping the goods; for a mere stranger's stopping the goods, without any degree of authority from the vendor so to do, will not be a legal stoppage, though the vendor subsequently give his assent to such act. (4)

In what cases
goods are *in
transitu*.

It is a general rule, that the *transitus* in goods continues in all cases until there has been an actual delivery to the vendee, or his agent expressly authorized for that purpose, with the express or implied consent of the vendor to sanction such delivery; for although there are many cases where, as between vendor and vendee, if no bankruptcy or insolvency happen, the goods are considered in the possession of the purchaser, by the delivery to a third person, as a carrier, &c., yet this is not such a delivery as will divest the vendor's right to stop *in transitu*, for such right can only be defeated by an actual delivery to the vendee, or his agent expressly authorized for that purpose, with such before-mentioned consent (5); and therefore goods remain liable to this right of the vendor, not only while they continue in the possession of the carrier by land or by water, but also in any place connected with the transmission of them to the vendee, until they arrive at the actual or constructive

(1) 3 T. R. 464. 3 Esp. 59.

(2) Per Lord Eldon. 19 Ves. 609. acc. 2 Vern. 203. 1 Atk. 245. 2 T. R. 674. 6 T. R. 80. 1 Esp. 578. 3 East, 93. Cowp. 296. Holt C. N. P. 340. Semb. cont. as to land, see Taunton v. Costar, 7 T. R. 431.

(3) Ambl. 399. 1 Esp. 240. 2 Bos. & P. 457. 2 T. R. 63. 3

East, 93. Whitaker, 171. As to what amounts to a presumed authority from subsequent acts, or acquiescence of principal, see ante, 196, 7. Paley, 124.

(4) 6 East, 371.

(5) See Ross, Vendor and Purchaser, 179. 3 T. R. 466. 468. 5 East, 184. 4 Esp. 85.

possession of the consignee (1). If goods consigned to the vendee are delivered to a wharfinger (2) or packer (3), on his account, to be forwarded or packed, though the wharfinger or packer be named, but is not actually employed by the vendee to receive them, they are liable to be stopped in the hands of the wharfinger or packer, on the insolvency of the vendee. A delivery of plate to an engraver to engrave the arms of the purchaser, at the expence of the vendor, will not defeat the latter's right to stop it *in transitu*, upon the bankruptcy or insolvency of the vendee (4). In these cases the wharfinger and packer are considered as middle men, and not the sole agents of the vendee. The delivery of goods to the master, on board a ship wholly chartered by the consignee, is not such a delivery to the vendee as to put an end to the *transitus*; for the master is a carrier of both consignor and consignee (5). A ship on board of which goods are loaded must have completed her voyage before the voyage can be considered at an end, so as to defeat the right of the consignor to stop *in transitu*; and where a ship which ought to have performed quarantine came into port without having done so, upon which the assignees of the consignee, who had become a bankrupt, went on board and claimed the cargo as belonging to the bankrupt's estate, and opened some of the packages, and put persons on board to keep possession, and afterwards the ship was ordered out of port to perform quarantine, and whilst the ship was performing quarantine the agent of the consignor claimed the goods on behalf of his principal, and offered the master of the ship an indemnity against adverse claims, which claim and offer were repeated after the quarantine was ended and the ship in port; it was held that the consignor had properly exercised, and might claim a stoppage *in transitu* (6). Goods deposited at the king's warehouses, on their arrival, for the duties under 26 Geo. 3. c. 59. may be stopped *in transitu*, though they have been claimed by the consignee. (7)

If the subject of the sale be in a mass with other matter not sold, as if it be part of a liquid contained in a vessel, no delivery

(1) 3 East, 397. 3 T. R. 466.

(4) 7 T. R. 64.

(2) 2 B. & P. 457. 1 Campb.
282. 3 T. R. 469. 7 T. R. 44.

(5) 3 East, 380. 1 East, 515.

(6) 1 Esp. 240.

(3) 3 T. R. 467. 4 Campb.
181.

(7) 2 Esp. 663.

short of the actual separation will defeat the right of the vendor (1). So, if goods in a mass previous to delivery are to be sorted, numbered, and weighed, the delivery of part from the mass will not divest the right of stopping the remainder (2), notwithstanding an order to deliver has been given to the wharfingers, and entered in their books (3), provided nothing remains to be done but to make the delivery; for if any thing remain to be done, for example, weighing, &c. the property does not pass, and the right to stoppage *in transitu* is not defeated till that be done (4). And where the carrier delivered eight out of ten tons of iron from on board barge on the purchaser's wharf, this was held not to be such a delivery as to divest the right of stopping *in transitu*, it appearing that it was the practice for the purchaser to have the iron, after delivery of the whole, weighed, and then to give the carrier a receipt, and that in this case there was no weighing nor any receipt, and the carrier, on hearing of the purchaser's insolvency, had taken away all the iron, claiming a lien thereon (5). So, in all cases where the goods are not in a deliverable state, and further acts are necessary to be done by the seller to make them so, as if the goods are to be separated from a mass, they may be stopped *in transitu*. (6)

If the property consigned does not come into the consignee's possession by the express or implied consent of the vendor, as if they come into his possession after the vendor has put in his claim, or if the goods have been delivered to the vendee under an express condition which has not been performed, as if they be delivered at the packer's of the purchaser, under condition that they were to be paid for in ready money, and the packer knew of this when he received them, the vendor does not thereby lose his right of stoppage *in transitu* (7). And where goods were sold free on board, and upon their shipment the agent of the vendors tendered to the mate (the captain being absent) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept but refused to sign, and on

(1) Holt C. N. P. 22. 13 East, 525.

(2) 6 East, 614. 11 East, 21.

(3) 2 M. & S. 397.

(4) Holt C. N. P. 18. 4 Taunt. 464. 5 Taunt. 617. 4 Camp. 237. 2 M. & S. 397. 1 Marsh, 260.

(5) Guildhall, cor, Abbott C. J.

post M. T. 1822., and on motion, in Hilary Term, for new trial, a receipt by consignee to carrier, where it defeats right, to stop *in transitu*, 2 Marsh, 127.

(6) 4 Taunt. 464. 5 Taunt. 177.

(7) 4 Campb. 181. 3 East, 585.

the following day signed bills of lading to the order of the vendees, it was held that the *transitus* was not at an end, the receipt not having been given, and that on the insolvency of the vendees the vendors were entitled to stop the goods (1). And if the vendor, whilst the goods in their transit are in the hands of a carrier, give the carrier notice not to deliver them over to the consignee, and the carrier afterwards does so by mistake after consignee's bankruptcy, the right of stoppage *in transitu* will not thereby be divested (2). The right of stoppage *in transitu* is not defeated by the carrier's right to a lien for his general balance against the consignee (3). Neither is such right defeated by the goods being attached by process of foreign attachment from the mayor's court in London at the suit of a creditor of the consignee, who can obtain no greater right over the goods than the consignee himself. (4)

There may be a sufficient delivery, by construction of law, to determine the *transitus*, and divest the vendor of his right of stopping the goods, without their coming to the corporal touch of the vendee (5). The delivery to the vendee of the key of the vendor's warehouse, in which the goods are deposited, seems to be an effectual delivery of them for this purpose (6). And if the goods, after being sold, and beyond the period at which they ought to have been removed, remain in the vendor's warehouse, and the vendor receive rent of the vendee for the same, the right of stoppage *in transitu* is divested (7); and it is so where, with the privity of the vendor, a wharfinger in whose custody the goods are, charges the vendee with warehouse rent (8). So where goods are delivered to a vendee at a wharf, who afterwards ships them there, no subsequent stoppage can be made (9). So if the vendee receive from the vendor an order for delivery, which he lodges with the wharfinger, who assents to the same, though no transfer be made in the wharfinger's books (10), provided nothing is to be done but to make the delivery, and the goods are not to be weighed, &c. the right of stoppage is gone. (11)

(1) 5 Barn. & Ald. 632.

(2) Holt C.N.P. 338. 7 Taunt. 169.

(3) 3 Bos. & Pul. 42.

(4) 1 Campb. 284. 3 T. R. 464.

(5) 3 T. R. 464. 466. 4 Esp. Rep. 82.

(6) See 3 T. R. 464. 8 T. R.

199.

(7) 1 Camp. 452.

(8) 2 Camp. 243. 1 Marsh,

257,8.

(9) 7 Taunt. 59.

(10) 2 Camp. 243. 7 Taunt. 278.

(11) Holt C. N. P. 18.

Where complete possession of the goods cannot be otherwise taken, from the nature or situation of them, the exercise of such acts of ownership as the circumstances of the case will permit seem sufficient. Thus a demand of the goods, and putting a mark upon them by the representative of the vendee, when they had arrived at the end of their journey, was held sufficient to put an end to the *transitus* (1). So the change of mark from A. to B., on bales of goods in a warehouse, by the directions of the parties, was held in the House of Lords to operate as an actual delivery (2). In the same manner, when timber to be paid for by a bill at a future day is marked by an agent of the vendee whilst lying at the wharf of the vendor, with his concurrence and assent, and a part delivery is made, which is sent off to the vendee's order, the right of stoppage is gone, both as to that part delivered (though it should not have reached its ultimate destination) as to the residue (3). And where goods, when sold, are lying at a wharf, and the vendor has given an order to the wharfinger to deliver them to the vendee, the mere weighing them by the vendee would be a sufficient assumption of possession to divest the vendor's right of stopping them *in transitu* (4). The transfer of a dock warrant to the vendee operates constructively as a transfer of the property in the goods sold, so as to defeat the vendor's right of stoppage *in transitu* (5). A delivery of possession to the vendee, or his representative, of part of the goods sold upon an entire contract, or any assent to a subsale will be considered as a sufficient delivery to determine the *transitus* as to the whole (6). So a part delivery under a bill of lading to a sub-vendee upon the arrival of the ship, was held to be equivalent to a full delivery. (7)

Any *actual* delivery to the vendee or his personal representative for that purpose immediately divests the vendor's right of stoppage; but many doubts and questions have arisen as to what will amount to such actual delivery. If a man be in the habit of using the warehouse of a wharfinger, or any other per-

(1) 3 T. R. 464.

(2) 14 East, 313.

(3) 14 East, 313.

(4) 1 N. R. 69. 4 Camp. 237.

(5) Gow. C. N. P. 58. See
7 Taunt. 265. 278. 1 B. Moore's
Rep. 12. Holt C. N. P. 395. S. C.

4 Camp. 251.

(6) 2 Hen. Bla. 504. 1 Bos.
& Pul. 69. 12 Ves. 379. 6 East,
614. 14 East, 308.

(7) 2 Hen. Bla. 504. 1 N. R.
69.

son, as his own, and makes it the repository of his goods, and dispose of them there, the journey will be at an end when they arrive at such warehouse (1). And where the vendee has no warehouse of his own, but uses that of his packer for receiving goods consigned to him, the *transitus* of such goods will be at an end on delivery of them to the packer (2). A delivery of goods on board a chartered ship, hired for a term of years, and fitted out, manned, and victualled by the consignee, and over which he has the complete control, to be sent by him on a mercantile adventure, for which purpose he has purchased them, is a sufficient delivery to put an end to the *transitus* (3). If goods are delivered to a vendee at a wharf, who afterwards ships them, no subsequent right of stoppage *in transitu* can take place (4). And where goods have so far got to the end of their journey, that they wait for new orders from the purchaser to put them in motion again, to communicate them to another substantive destination, and if without such orders they would continue stationary, the right of stoppage *in transitu* no longer remains in the consignor (5). With respect to who may be considered as the vendee's representative, in order to accept his goods, and divest the vendor of his right of stoppage *in transitu*, it may be laid down as a general rule, that any party who is specially appointed by the vendee for that purpose, of accepting the goods upon the vendee's sole account, and not as a middle man between the vendor and vendee, is a sufficient person for that purpose, and that any delivery to, or acts of ownership over the goods by such person on the part of the vendee, will be sufficient to divest the vendor of his right to stop the goods *in transitu*; as where goods are delivered to a packer specially appointed by the vendee to forward them to any port the latter may appoint, and are opened and examined by the vendee's agent, this right of the vendor is divested (6). So the delivery to a warehouseman, to whom the vendee pays warehouse rent, is sufficient for that purpose, though they have not reached their ultimate destination (7). But, as we have before seen, if the party to whom the goods are delivered can be considered as a middle

(1) 3 Bos. & Pul. 127. 320.
472. 5 East, 185. 8 Taunt. 83.

(2) 3 Bos. & Pul. 469.

(3) 3 T. R. 442. 1 East, 522.
3 East, 396.

(4) 7 Taunt. 59.

(5) 5 East, 175.

(6) 3 B. & P. 320. 5 East,
175.

(7) 3 B. & P. 127. 14 East,
308.

man, and the agent of both parties, the vendor's right of stoppage will not be affected by a delivery to him (1). Though the right of stoppage in general continues till the goods arrive at their journey's end, yet if the vendee meet them on the road, and exercise acts of ownership over them, or take them into actual possession, the goods will then be considered to have arrived at their journey's end, with reference to the right of stoppage (2). But there seems some distinction in this respect between goods sent by carriers by land, and those sent by carriers by water under bills of lading, for the goods to be delivered at a particular place. In the latter case, the above doctrine, it is said, does not apply, and the *transitu* cannot be determined till their arrival at the particular place, unless the bill of lading has been transferred to a third person. (3)

When right to stop goods *in transitu* is divested by vendees disposing of the property to third persons.

As a general rule it may be considered, that the consignee of goods by the assignment of a bill of lading, or other disposal thereof to a third person for a valuable consideration, may confer an absolute right and property upon such assignee, indefeasible by any claim on the part of the consignor; subject, however, to this restriction, that the assignment should be made *bonâ fide* to all parties, and without notice to the assignee that the vendee is insolvent (4). And though we have seen that a factor cannot pledge goods delivered to him to sell (5), yet, if the purchaser of goods, having received the bill of lading, pledge it *bonâ fide* to a third person as a security for money advanced, the vendor's right of stoppage *in transitu* is determined; and although the money advanced may not be equal to the value of the goods, yet the pawnee holding the bill of lading may, in an action of trover against the vendor, who has attempted to stop the goods *in transitu*, recover their full value (6); and it has even been held, that where the vendor of the goods detained the bill of lading on account of the same relating to more goods than those sold, but delivered to the vendee a written undertaking to deliver the goods, on arrival, to the vendee, who thereupon accepted bills for the price, and the vendee before the arrival sold the goods to

(1) See ante, 344.

(2) 4 Esp. 82. 2 Bos. & P. 457. 461.

(3) See Long on. Pers. Prop. 181. 1 Esp. 240. 2 B. & P. 461. Abbott on Shipping, 362. 3 Bos. & P. 584.

(4) 2 T.R. 63. 4 Camp. 31.

(5) Ante, 204-5.

(6) Gainsford v. Scovells, Kingston Spring assizes, 1823, coram Richards C. B. Wilks, jun. attorney for defendant, and case then cited.

a third person, and delivered the undertaking to him, and became insolvent before the arrival of the goods, it was held, that such third person was entitled to recover the value of the goods from the vendor, who had stopped them as *in transitu* (1). But if there be no consideration (2), or there appear any fraud in the assignment on the part of the assignee, with a view to deprive the vendors of their right to stop the goods *in transitu*, and of the price of the goods, the assignment will be invalid as against the vendors (3). If the assignee, though for valuable consideration, know of the vendee's insolvency at the time of his accepting the assignment, he can gain no legal title to the goods thereby, as against the vendors (4); and if the assignee as well as the consignee are in insolvent circumstances at the time of the assignment, and the assignee gives bills in payment knowing they are but waste paper, it would be a question for a jury whether there would not be such a degree of fraud in the transaction as to vitiate the assignment (5). But if the assignee of a bill of lading take the assignment *bonâ fide*, without notice of any such circumstances as ought in fairness to have tied up the hands of the consignee from a transfer, he acquires a good title against the consignor; and therefore, although he knew at the time that the consignor had not obtained a money payment for the goods, but had taken the consignee's acceptance payable at a future day then arrived, the consignor could not nevertheless defeat his title under the assignment, nor stop the goods *in transitu* on the insolvency of the original vendee (6). If the vendors have not parted with all controul over the goods, and the right of stoppage *in transitu* is not gone, the assignee cannot (except in the cases before mentioned) (7), acquire any property by assignment to him whilst such controul exists, for the consignee cannot give to the assignee in this respect any larger title than he himself possesses. When the master of a ship receives goods on board, and gives a receipt for them, it is his duty not to deliver the bill of lading except to the person who can give the receipt in exchange; and where A. sold goods on credit to be delivered free on board a particular ship, A. loaded them on board, and took a receipt from

(1) *Stapp v. Ogilby*, Sittings after H. T. 1823. G. H. C. P. 3 T. R. 119.
 (2) 1 Camp. 369.
 (3) 4 Burr. 2046. 2 T. R. 674.
 (4) 4 Camp. 31. 1 B. & P. 563.
 (5) *Holt C. N. P.* 251.
 (6) 9 East, 506.
 (7) Ante, 350., note 4, 5, 6.

C., which purported that the goods were for and on account of A., and before the delivery B. had sold the goods to D., who, without the knowledge and consent of A., obtained a bill of lading from C., and B. became insolvent; it was held, that A. was entitled to stop the goods *in transitu*, and that C., having refused to deliver them on production of the receipt, was answerable to A. in an action of trover, and that A.'s right would have been the same, although the receipt had not contained the restrictive words, but had been in the general form (1). No particular form of assignment is necessary, provided every thing be done which is sufficient in law to transfer the property (2). An invoice (3), and by the usage of trade, West India dock warrants (4) indorsed *bonâ fide*, and for good consideration, will be sufficient for this purpose. If the purchaser of goods to be paid by bill, after giving his acceptance during the time of credit, and while the goods are *in transitu*, sell them to a third person for a valuable consideration without transferring any bill of lading to him, the right of the original vendor to stop the goods *in transitu* is taken away (5). However the most usual (and in some cases the only) method, of making this assignment, is by transfer of the bill of lading; and this is done in different forms; sometimes it is made for delivery to the consignor or assigns, sometimes to order or assigns, not naming any person, and at other time to consignee by name or assigns. In the first two cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person, or indorses it specially for delivery to a person named in the indorsement (6). The mere possession of this bill of lading, made for delivery to the consignor, and not indorsed by him, is not sufficient to entitle the holder to possession of the property. On the other hand, if the bill of lading be originally made for delivery to the consignee, or being made for delivery to the consignor or assigns, or to order or assigns, be indorsed

(1) Holt, C. N. P. 100 6 Taunt. 433. 2 Marsh., 127. S. C.

(2) Whitaker, 209. 4 Camp. 267.

(3) 1 Atk. 245.

(4) Holt, C. N. P. 395. 1 B. Moore, 12. sed quære. See 7 Taunt. 265. 278.

(5) 4 Camp. 267.

(6) Ross, 217. Abbott on Shipping, 377. There may, however, exist special circumstances, which will be considered tantamount to an indorsement, if done *bonâ fide* by a person having competent authority. Peake, C. N. P. 188.

by the consignor, either to a person by name, or generally without designating any person, in these cases, the consignee named in the bill of lading, and holding the bill of lading indorsed in blank, may generally speaking transfer his property to a third person. If the consignor delivers the goods to the sub-vendee, either in part or in whole, he thereby admits the latter's right to receive them, and his right of stoppage *in transitu* is gone. (1)

(1) 2 H. Bla. 504. 1 New Rep. 69.

CHAP. VIII.

Of Bailees of every Description, and in particular of the Duties and Rights of Innkeepers, Warehousemen, Wharfingers, and Carriers.

BESIDES the contracts relative to the manufacture, sale, and exchange of goods, transactions relative to the *bailment* of them, for various purposes, are of frequent occurrence.

Bailment is a delivery of property, on a condition expressed or implied, that it shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which it was bailed shall be answered (1). The party who bails the property is the bailor, and he who receives it the bailee (2).

(1) See Sir W. Jones on bailments, 2 Lord Raym. 909.

(2) Cases also frequently arise where a person may become possessed of the property of another, without the same having been confided to his care by the latter, as where an article is found, or in case of a capture. In these cases, the party possessed of the property seems bound to exercise even more care than an ordinary bailee; however, many of the rules applicable to bailments will govern. In the case of the *William*, 6 Robinson's Rep. 316, respecting the liability of a captor for the loss of a ship in his custody, Sir W. Scott makes these observations:—"On questions of this kind, there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This I think is not a just criterion in such cases, for a man may, with respect to his own property, en-

counter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is or may be supposed to be acquainted with his character, the care which he would take of his own property might indeed be considered as a reasonable criterion. But in cases of capture, there is no confidence reposed, nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force, but still of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize master. It is not enough therefore, that a person in that situation uses as much caution as he would use about his own affairs. The law requires that there should be no deficiency of

There are five sorts of bailment (1), viz.—1st. *Depositum*, or *deposit*, which is a naked bailment, without reward, of property to be kept for the bailor: 2d. *Mandatum*, or *commission*, when the mandatory undertakes, *without recompence*, to do some act about or relating to the things bailed, or simply to carry them: 3d. *Commodatum*, or *loan for use*, when property is bailed without pay, to be used for a certain time by the bailee: 4th. *Pignori acceptum*, or *pawn*, when a thing is bailed by a debtor to his creditor in *pledge*, or as a security for the debt: 5th. *Locatum*, or *hiring*, which is always *with a reward*, and this bailment is either 1. *Locatio rei*, or *hiring* of the thing by the bailee, by which the hirer gains the temporary use of the thing; or, 2. *Locatio operis faciendi*, when work and labour, or care and pains are to be performed or bestowed on the thing delivered; or, 3. *Locatio operis mercium vehendarum*, when goods are bailed for the purpose of being *carried* from place to place, either by a public carrier, or by a private person. (2)

In every species of bailment there arises an implied contract and duty, on the part of the bailee, to take such care of the property bailed to him, as a rational and prudent man would observe in the management of his own concerns. In general the care of a man remarkably exact and thoughtful is not required; and provided the bailee use such ordinary care as a man of common sense would apply to his own affairs, it will in general be sufficient (3). However, from the nature of the bailment, and the circumstances under which it is made, there may arise an obligation and duty to exercise more than this ordinary care, and in every species of bailment, though there be a stipulation against it, the bailee will be responsible for any deceit or gross negligence. As the degrees of rights and duties respectively of the bailor and bailee must

due diligence." It was held in that case, that a captor was liable to the claimant for loss occasioned by not taking a pilot on board. In case of the *Hoop*, 4 Rob. Rep. 14, where a demand was made on the Marshal of the Admiralty for loss of a long boat whilst the ship was under his custody, he was held liable, he not shewing it was lost

without his default.

(1) Sir W. Jones, 35. Ld. Raymond, 912. Ld. Holt in that case made six divisions, but Sir Wm. Jones shews that his fifth is merely a part of his third.

(2) See Sir W. Jones on Bailments, 36. Ld. Raymond, 909.

(3) See Jones, 6.

necessarily be governed by the nature of the bailment, and the circumstances under which it is made, the most practical mode of enquiring into them will be to examine the several species of bailments separately. Some positions in this chapter will be found to depend principally on the observations of learned authors on the subject, but many of them are supported by judicial decisions. The 4th and 5th divisions of the subject are necessarily more frequently the subject of litigation than those which precede.

1. *Depositum* or bailment for no particular purpose, without recompence to bailee.

I. *Depositum*; or *deposits where the property bailed is to be kept by the bailee for no particular purpose without any recompense to him*. Under this species of bailment, the bailee must observe such degree of care over the property bailed, as a man of ordinary reason and prudence would observe over his own property under the like circumstances (1); and he is not liable for any loss not arising from the misconduct of himself or his agents, or from an accident over which he could have no controul (2); and if the bailee be known to the bailor to be a man of extreme want of care and vigilance in his own affairs, even less than ordinary care, it is said, would be sufficient as against the bailor (3). The degree of care should however in general be apportioned to the nature, quality, and value of the property bailed; for if a bailee of this kind, knowing the property to be of great value, or to be of such a nature requiring more than common care, and if it were his own would exercise such care, should observe even ordinary care over it as property of little value, and the property should be lost or destroyed from the

(1) Willes, Rep. 121. 2 Stra. 1099. *Mytton v. Cock*, the plaintiff, who was owner of a cartoon, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or redeliver it safe, and without any agreement for a reward. And in a special action upon the case, for not redelivering it safe, but suffering it to be spoiled, it appeared upon the evidence that the painting was upon paper pasted on canvas, and that it was kept by the defendant in a room next to a stable, in which there was a wall that had made it

damp and peel; and upon this evidence, it was left to the jury, whether this was a gross neglect, and they found for the plaintiff \$30l. damages; and upon motion for a new trial, the court agreed that in this case of a simple *depositum* without a reward, the law raises only a promise not grossly to neglect or abuse the deposit; and that therefore it was left properly to the jury, and there ought to be no new trial.

(2) Jones, 48. 4 T.R. 581. 1 Selw. N. P. 397. 5 ed.

(3) See Jones, 47.

want of more than ordinary care, he would be liable; as if plate, jewels, or small trinkets, be suffered indiscriminately to lie about the rooms of the bailee, without being locked up, and they should be stolen, the bailee would be liable, for no man of common prudence would so act. If A. sends his horse to B., a mere gratuitous bailee without reward, who turns the horse after dark into a dangerous pasture to which it was unaccustomed, though the place might be perfectly safe to his own cattle, yet to this animal it would be otherwise, and B. would be liable to A. for any injury arising to the horse therefrom (1); so if a bailee whose house is on fire has only time to save one of two chests, and one being a deposit contains precious goods, while his own is filled with property of little value, he ought to save the more valuable chest, and claim indemnification from the loss of his own from the depositor; but he might save his own first, if it is of equal value with the bailor's (2); but the bailee should know, or be capable of knowing, the nature and value of the property delivered to him; for if the bailor should at the time of the delivery of the property conceal the value of it, or so deliver it as to prevent the bailee from knowing its value, the latter will not be liable for more than ordinary neglect, though the property be of the greatest value; as if the bailor make a bailment of this nature of a chest containing goods, without informing the bailee of its contents, and the bailee has no easy means of ascertaining them, he would not be liable for their loss, though they be very valuable, provided he used ordinary care over the chest (3). More than ordinary care may be required, where the bailee expressly agrees to exercise it (4), or where, from the circumstances of the case, such agreement may be implied; as if a man spontaneously and officiously proposes to keep the goods of another, he may prevent the owner from entrusting them with a person of more approved vigilance, for which reason he takes upon himself the risk of the deposit, and becomes liable to exercise more than ordinary diligence (5). In both these cases, the bailee should act with perfect good faith, and depending on the nature of the agreement, and the circumstances under which the bailment was made,

(1) Dictum of Lord Ellenborough, in 1 B. & A. 62. Holt and Sir Edw. Coke, ante, 355.

4) Southcote's case, 4 Coke, 83.

(2) Jones, 47. 1 Camp. 138.

(5) Jones, 59.

(3) Jones on Bailments, Lord

he will be liable for any loss or injury to the bailment which he could with more than ordinary care have prevented. A bailee is in all cases liable for fraud or gross negligence, and the bare leaving of goods in the custody of another person, raises an implied undertaking or duty on his part not grossly to neglect the care of them (1); but a bailee is not liable, if he be robbed of the goods (2). A bailee of this nature should always be prepared faithfully to redeliver the thing bailed, upon request of the bailor, and he cannot dispose of or detain it on any account against the consent of the bailor (3); as against third persons, he may support an action for any injury done to them, though he be not liable over to the bailor (4); a bailee for safe custody cannot prejudice the owner of the goods by a sale or a pawn. (5)

II. *Mandatum*, or bailment for some particular purpose without recompence.

II. *Of bailments of goods to the bailee, who undertakes without recompence to do some act, about or relating to the thing bailed, or simply to carry it.* The distinction between this and the preceding species of bailment is, that the latter lies in *seazance*, the former only in *custody*. The bailee in this case is considered as having engaged himself to use a *degree of diligence and attention adequate to the performance of his undertaking*, and he is obliged to exert himself *bônâ fide* to the utmost of his usual ability, in proportion to the exigence of the affair in hand, and neither to do any thing, how minute soever, by which his employer may sustain damage, nor omit any thing, however inconsiderable, which the nature of the act requires to be done (6). If a person without pay assume safely to remove several casks of brandy from one cellar, and lay them safely in another, but manage them so negligently that one of the casks is staved, he will be liable (7). So, though upon a contract to build a house, no action can be supported for a mere nonfeazance, unless it be alleged and proved that the builder was to have remuneration, yet it is otherwise if he proceeded on the work, and constructed the building inartificially (8). The captain of a vessel who carries the goods of another, though

(1) 2 Stra. 1099. Ante, 356. n. 1. 653. 1 Bulst. 69. Bro. Tresp. 67.

(2) Willes, 121.

(5) 2 Stra. 1187. 1 Wils. 8, 9.

(3) See Jones, 52. 15 East,

15 East, 42.

42, 3. 2 Bla. Com. 452. 2 Hen. Bla.

(6) Lord Raym. 909. Jones on B. 51.

(4) 1 Barn. & Ald. 59. 2 Roll. Ab. 551. 569. pl. 5. 2 East, P. C.

(7) Lord Ray. 909.

(8) 5 T. R. 243.

not for hire, is bound to take prudent care of them, and if he intermeddle with the chest of a seaman, who has been casually left behind, he is bound to restore it to its former state of security, particularly if the contents be valuable (1). A bailee of this species may be liable for a nonfeasance as well as for a misfeasance; but there must be a stronger case of negligence in an action for an injury arising from nonfeasance, than that arising from misfeasance (2). The bailee is not required to exert more than his usual ability and skill in the business undertaken by him. More will, however, be required of him, if from the nature of the engagement he may be presumed to have more ability and skill than ordinary persons, as if a farrier undertakes without reward to shoe a horse, and he shoes it so very badly, that the horse is lamed, there is but little doubt he would be liable. If, on the other hand, a party who is not or does not profess himself to be a farrier should upon the request of the owner of a horse shoe it, and it should turn out lame, he would not be liable (3). So where A., a general merchant, undertook gratuitously to enter a parcel of goods of B., together with a parcel of his own of the same sort, at the custom-house for exportation, but made the entry under a wrong denomination, whereby both parcels were seized; it was held, that A. having taken the same care of the goods of B. as of his own, and not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, is not liable to any action for the loss occasioned to B. (4) If a party should delude another by false pretensions to skill, then indeed he would be bound to fulfil the reasonable expectations of the bailor, and be responsible for any injury occasioned by such delusion (5). A bailee of this description may bind himself by special agreement to be answerable even for casualties, but no stipulations can exempt him from responsibility for gross neglect. The necessary degree of care and attention over a bailment of this sort, must, as in the case of a mere deposit, be determined by the nature of the bailment,

(1) 1 Stark. 237.

(2) Lord Raym. 909. 1 Salk. Com. 133. Farr. 13. 131. 528. 1 Roll. Ab. 10. 5 T. R. 143. 150. Jones on B. 56. 61. Bro. Ab. title, Action sur le Case, 72. 2 Hen. Bla.

(3) See Roll. Ab. 10. 2 Hen. Bla.

Rep. 161. This authority, however, does not lay down the above position; it is presumed, however, it would warrant it.

(4) 2 Hen. Bla. 158. See 8 East, 352.

(5) 8 East, 348. Bac. Ab. tit. Action on the Case.

and the observations in this respect on the law of deposits will apply to this branch of our enquiry. The bailee in this case is always liable to redeliver up to the bailor the thing bailed; and he cannot dispose of or pledge it (1); and this whether the purposes for which the thing was bailed have been fulfilled or not, as in the case of stake-holders, who are bound to be always ready to redeliver the stake to either party. (2)

III. *Commodatum*, or bailments for use, when property is bailed without pay, to be used by the bailee.

III. *Commodatum*, or bailments for use, when property is bailed without pay, to be used by the bailee. This is a species of bailment, as observed by a learned writer on the subject, of very frequent occurrence, and very useful in society (3). It may be termed loan for use, to distinguish it from loan for consumption, or, in other words, to distinguish it from that loan, such as of money, wine, corn, and other things that may be valued by number, weight, or measure, and are to be restored in equal value or quantity, and not in specie; and where an absolute property in the loan being transferred to the bailee, he must bear every kind of loss or injury thereto; while in a loan for use the property lent must be re-delivered specifically, and the bailor must abide the loss, if they perish through any accident which a very careful and vigilant man could not have avoided (4). In this species of bailment, more care and attention is required of the bailee over the thing bailed than in the two preceding, because the borrower alone derives benefit from the bailment; and the bailee in this case is liable if the property borrowed be stolen out of his possession by any person, unless he prove that it was taken, notwithstanding his extraordinary care (5). Indeed it is laid down, that he will be liable for a loss arising from any thing short of absolute impossibility to prevent it, such as a loss by the act of God, or by irresistible force, and even in these cases he will not be excused, when he might have avoided the loss by acting prudently (6); as if the borrower of a horse be imprudent enough to leave the high road and pass through some thicket where robbers might be supposed to lurk, or he travel in the dark at a very unseasonable hour, and has the horse in either case taken from him or killed, he must

(1) An executor cannot pledge property of intestate. 17 Vcs. 170.

(2) 7 Price, 540.

(3) Sir Wm. Jones, 63.

(4) See Jones, 63, 4.

(5) Jones, 65.

(6) Jones, 64.

make it good to the owner, for irresistible force is no excuse if a man put himself in the way of it by his own rashness (1). There are other cases in which a borrower is chargeable for inevitable mischance, even when he has not taken upon himself the whole risk by express agreement. If the house of A. be in flames, and he, being able to secure one thing only, save an urn of his own in preference to the silver ewer which he had borrowed of B., he shall make the lender a compensation for the loss, if the ewer be more valuable, and would consequently have been preferred had he been owner of them both. And if a party should obtain property from the owner under any material suppression of truth or deceit, he would be liable even for any inevitable accident or loss (2). If the bailor, as in the two preceding species of bailments, should lend his property to a party whom he knows ought not to be trusted with it, or should conceal its value, and the bailee does not know it, or have no means of knowing it, here, indeed, the law would not require such extraordinary care; as if A. lend a fine horse to a raw youth, he cannot exact the same degree of management and circumspection which he could exact from a riding master or an officer of dragoons (3). Where property is lent for a use in which the lender has a common interest with the borrower, in this case, as in other bailments, reciprocally advantageous, the bailee can be responsible for no more than ordinary neglect (4); as if A. and B. invite some common friends to an entertainment prepared at the joint expence, for which purpose B. lends a service of plate to his companion, who undertakes the whole management of the feast, A. is obliged to take only ordinary care of the plate. So, if goods be lent for the sole advantage of the lender, the borrower is answerable only for gross neglect; and here again the bailee cannot dispose of or pawn the thing bailed, but must be prepared at all times to return it to the owner (5); and though a hirer for money may do so, yet a person who has the gratuitous loan of a chattel cannot in general lend or let the same to a third person. (6)

IV. *Pignori acceptum*, or pawns, and bailments of a thing by a debtor to his creditor in pledge, or as a security for a debt. Here indeed the bailment is beneficial to both parties, to the

IV. *Pignori acceptum*, or bailments for pledge or security.

(1) Jones, 67. Lord Raym. 915.

(2) See Jones, 69.

(3) Jones, 65. 8 T. R. 337.

(4) Jones, 72.

(5) See 2 Stark. 539. and 2 T. R. 376.

(6) 1 Mod. 210.

pawnee, by securing the payment of his debt, and to the pawnor by obtaining him credit. The pawnee is bound to observe ordinary care over the thing bailed (1); if goods be taken out of his possession through stealth, or by the want of due care, he will be liable, and if the value of them exceed the amount of his debt, the latter will be discharged, but not if the goods are forcibly taken out of his possession, unless indeed through his fault (2). A pawnee of goods cannot use or dispose of them, unless under the express or implied consent of the owner. An implied consent of the owner will not be presumed where the goods pawned would be the worse for using, and the pawnee uses them at his peril; as if jewels be pawned to a lady, if she keep them in a bag, and they are forcibly stolen, she would not be chargeable, but it would be otherwise if she wore them at the play (3). But if the goods or property pawned required using, and they would be none the worse for it, then indeed the owner's consent to their usage would be implied; as if a horse, a cow, a setting dog, or the like, be pawned, the pawnee might use them, and especially if he be at any charge in their keep (4). If goods are deposited as a security for a loan of money, it will in some cases be inferred, that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit (5). There are many useful legislative regulations relating to bailments of this nature with pawnbrokers, which will be found in the 30 Geo. 2. c. 24. 39 & 40 Geo. 3. c. 99. (6) A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due (7). When the debt or purpose for which the property has been pledged as a security has been discharged or fulfilled, the bailee is bound to re-deliver such property over to the owner, when requested by him so to do. (8)

(1) Jones, 75. Bull. N. P. 72. a.

(2) See Jones, 75. 79. Lord Raym. 917.

(3) Lord Raym. 917. Owen, 123. Jones, 80.

(4) Bract. 99. Bull. N. P. 72. a. Jones, 81, 2.

(5) See Holt C. N. P. 383.

(6) See also 1 Jac. 1. c. 21. concerning pawnbrokers in London.

(7) 5 Barn. & Ald. 439. 1 Dow. 1. S. C. 1 Stark. 472.

(8) See 2 Blac. Com. 452.

V. *Of locatum, or bailments where the thing is either let to hire, or is bailed for work, labour, and care to be bestowed upon it, or where it is to be carried by the bailee from place to place, the bailor and bailee in all these cases receiving some reward and benefit from the bailment.* This is one of the most important species of bailment, from the great convenience and daily use of it: we will consider it in all its branches, and *first, where the thing is let to hire for reward.* By this bailment, the hirer gains a temporary qualified property in the thing hired, and the owner acquires an absolute property in the stipend or price of the hiring. The hirer is not bound to exercise more than ordinary diligence and care over the thing let to hire, such as a prudent man would use if it were his own (1). The necessary degree of care will be simplified by the following instance: if A. hire a horse, he is bound to ride it as moderately, and feed (2) and treat it as well and carefully, as any man of common discretion would ride, feed, and treat his own horse; and if through his misconduct or negligence, as if he immoderately ride the horse (3), or badly feed (4) or treat it; as if the horse be ill, and he does not call in a farrier, but imprudently gives medicines to it himself (5); or if the horse be exhausted, and refuse its feed, and he still uses it (6), and the horse be injured, or die by any of these means; or if he leave the door of his stable open at night, and the horse be stolen (7), he will be answerable for it; but he would not be liable if he managed or treated the horse as a prudent man would do his own (8), or for any injury or loss occasioned without his default, or by accident, or the forcible violence of third persons. If therefore the horse fall by accident (9), or be burnt in a fire (10), or the hirer be robbed of it by highwaymen (11), he would not be liable, unless indeed either of these circumstances arose from great want of

V. *Of locatum, or bailments for hire, &c. where some reward is to be given.*

1st. Where property is let to hire.

(1) Lord Raym. 916. Bull. N. P. 72. acc. Jones, 89.

(2) 2 Brod. & B. 359.

(3) Jones, 89. 5 Esp. 35.

(4) 2 Brod. & B. 359.

(5) 3 Campb. 5.

(6) 1 Gow. C. N. P. 1.

(7) Jones, 89.

(8) A hirer may let another person ride, but a borrower cannot, 1 Mod. 210.

(9) 3 Campb. 5. in notes.

(10) Longman v. Gallini, K. B. 1809. It was decided by Lord Kenyon, in the case of Longman v. Gallini, at sittings at Westminster after Easter Term 1790, that the hirer of musical instruments to be used at the opera-house, and which were destroyed by fire there, is not responsible for the loss. N. B. referred to an opinion of the late Mr. Sergt. Williams. 5 MS. Op. 118.

(11) Jones, 89.

care; nor would he be liable if he called in a farrier to attend a hired horse, and the farrier administered improper medicine (1). If A. hire a carriage, and any number of horses, and the owner send with them his postilion or coachman, A. is discharged from all attention to the horses, and remains obliged only to take ordinary care of the glasses and inside of the carriage while he sits in it (2). The negligence of a servant acting under his master's directions, express or implied, is the negligence of the master; so that if the servant of A. injure or kill the horse by riding it immoderately, or suffer thieves to steal it by leaving the stable-door open, A. must make the owner compensation for his loss (3); and it is just the same if he take ready furnished lodgings, and his guests or servants, while they act under the authority given by him, damage the furniture by the omission of ordinary care (4). It will not be improper to add, that if *immoveable* property, as an orchard, a garden, or a farm, be let by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence in preserving the trees, plants, or implements, that every prudent person would use if the orchard, garden, or farm were his own. (5)

2dly. *Locatio operis faciendi*, or where property is bailed to have some labour or care bestowed on it, with reward to the bailee.

Secondly, where property is bailed, to have some labour or care bestowed on it, with reward to the bailee. This species of bailment embraces all those cases in which the bailee undertakes to execute work for a sum of money, to be paid to him by the bailor, and expressly or impliedly to exercise his care and attention over the property committed to his charge, for a remuneration, to be repaid by the owner of them. Here the bailee, being rewarded for his services, is bound to use more care than the gratuitous bailee, (who is only liable for slight neglect), and he must observe the same degree of care over the property bailed, as the hirer of property should do; the observations under that species of bailment will be therefore here applicable. A watchmaker is bound so to secure property placed in his hands in the way of his trade, as to protect it against depredations that may be committed by the persons in his employ; therefore, where A. intrusted B.,

(1) 3 Campb. 5.

(2) Jones, 89. 5 Esp. 35.

(3) Salk. 282. Lord Raym. 916.
3 Campb. 5.

(4) 4 Term Rep. 319. 5 Term
Rep. 373. The hirer of goods is

not answerable for their loss by
fire, Longman v. Gallini, Sittings
at Ni. Pri. K. B. 1809. Ante, 363.
n. 10.

(5) See 5 T. R. 373. 4 East.
154.

who was a chronometer maker, with a chronometer to be repaired, and B. suffered his servant to sleep in the shop in which the chronometer was deposited, B. was held liable to A. for its value, B.'s servant having stolen it, and B. at the time when the theft was committed having deposited his own watches in a more secure place than that in which the chronometer was placed (1); and it has been held (2), that the proprietor of a dry dock, into which a vessel had been put for repair, is liable for the injury sustained by the water bursting the dock gates, by a remarkable high tide, and forcing her against another vessel, because, though the gates were strong enough to have resisted the ordinary pressure, yet it was shewn that the accident might have been prevented, had there been a proper number of workmen present on such an emergency. A person who takes in horses or cattle to agist, is bound to take more than ordinary care over them (3); and leaving open the gates of his field, or suffering the hedges to be in such a bad state of repair, that the horses or cattle escape, and are injured or stolen, will make him liable (4). So a bailee to keep for hire must take care and not deliver the goods to an unauthorized person; and therefore where A. directed the London Dock Company to deliver a quantity of hides belonging to him in their custody to B. (supposing that B. had purchased them from him), and the dock company delivered them upon an order, purporting to be the order of B., but which was a mere forgery, B. in fact not having purchased the goods, it was held, that the dock company were liable to A., although he neglected to apply to B. till four months afterwards, when the supposed time of credit expired, and although A. might, after discovering the fraud, have recovered possession of his hides from another person. (5)

By the general law of the realm, an *innkeeper* is bound to keep safely all such things as his guests deposit within his inn, or in his custody as an innkeeper (6); and he is liable civilly for

. (1) 1 Gow. C. N. P. 30. See Law of Carriers, 144. Jones, 95.
 1 Campb. 138. A house of public entertainment
 (2) 1 Campb. 138. in London, where beds, provisions, &c. are furnished for all
 (3) Holt C. N. P. 547. 8 Rep. persons paying for the same, but
 32. Jones, 91. which was merely called a tavern
 (4) Id. and coffee-house, and was not frequented
 (5) 1 Stark. 104. by stage coaches and
 (6) Year Book, 10 Hen. 7. waggons from the country, and
 p. 26. 8 Rep. 63. See Jeremy's

all losses, except those arising from irresistible force, or from what is vulgarly called the act of God, or the king's enemies (1); and though the innkeeper may relieve himself from liability by showing that the loss was occasioned by the guest's own default, as that the robbery was committed by the servant or companion whom the guest brought with him, yet he cannot relieve himself from his general liability by any plea of sickness, or even of insanity, at the time of the loss (2). This obligation has been treated as bearing hard upon innkeepers, who ask no reward in particular for the care of the goods, and are bound to receive all travellers as long as they have room, on condition of their paying for the accommodation; but the law considers that the custody of the goods is part of the consideration which induces a party to enter into an inn, and that the money paid for provisions and apartments obliges the innkeeper to extend his care over the property of his guest that may be brought into the inn, and that it is consistent with good policy that a traveller should feel that he and his property are safe when at an inn, and that the innkeeper should have every inducement to make a prudent choice of honest servants, and be vigilant in the management of his household. (3)

An innkeeper cannot discharge himself from this responsibility by *refusing* to take charge of the goods because there are suspected persons in the house, whose conduct he cannot controul (4). Even though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels, he is still liable for a loss, if the goods are deposited in the inn, and the owner remain therein as a guest (5). But it is otherwise if he refuse admission to a traveller, having no room for him, and the traveller enters the inn and places his baggage in an apartment without the keeper's consent (6). When the guest quits the inn, any property left in the custody of the innkeeper then becomes a simple deposit, or a deposit for hire, as the case may be, and the general law of bailments prevails.

which had no stables belonging to it, was, in *Thompson v. Lacey*, 3 Barn. & Ald. 283, considered as an inn, and the owner of it as subject to the same liabilities of an innkeeper. With respect to the liability of an hotel keeper, see 2 Chitty Rep. 484. 4 Campb. 77.

(1) 1 Bla. Com. 43. Jones, 95, 6.

(2) Jeremy, 145. Cro. Eliz. 622.

(3) Jones, 95.

(4) Jones, 95. 5 T. R. 273.
8 Coke, 32.

(5) 5 T. R. 273.

(6) Dy. 158 b. 1 And. 29.
See 2 Stark. 544.

In all such cases it is not competent to the innholder to resist the claim upon him, by proving, that he took *ordinary* care, or that the *force* which occasioned the loss or *damage* was truly irresistible. The guest need not deliver the goods in special charge to the innkeeper, nor acquaint him that he has any. If he have property with him, or about his person, the innkeeper is bound to the custody of it without communication (1). But the innkeeper may require that the property of his guest be delivered into his hands, in order that it may be put into a secure place, and if the guest refuse, the innkeeper is not liable for its safety (2). The guest exonerates the innkeeper from liability where he takes upon himself the exclusive custody of the goods, so as to deprive the innkeeper of having any care over them; thus, if a guest demand and have exclusive possession of a room, for the purpose of a shop or warehouse, he exonerates the landlord from any loss he may sustain in the property which he keeps in that apartment, but not so if he have not exclusive possession of the room (3). The innkeeper cannot oblige the guest to take charge of his own goods; for this, in effect, would be a refusal to admit them into the inn (4). And it is no excuse for an innkeeper to say that he delivered the key of the chamber in which the property stolen was placed to the guest, who left the door open (5), though, under circumstances, it would be a proper question for a jury to say whether the taking of such key by the guest was not *animo custodiendi*, and for the purpose of exempting the landlord from liability. (6)

By the statute 6th Anne, c. 31. (7) it is enacted, "that no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose *house* or *chamber* any fire shall accidentally begin, or any *recompence* be made by such person for any damage suffered or occasioned thereby." This act seems to exonerate bailees in general from liability to make good losses arising from fire beginning in a *house* or *chamber*, and this provision extends over the whole kingdom. By the 14 Geo. 3. c. 78. s. 86., this relief from responsibility is extended, as far as respects places within the bills of mortality, to losses arising from fire

(1) 8 Rep. 63.

(5) 8 Rep. 63.

(2) Ibid.

(6) 4 M. & S. 306. Holt C.N.P.

(3) Holt C.N.P. 209. 1 Stark. 211. note.

249.

(7) See also 14 Geo. 3. c. 78.

(4) 5 T.R. 273.

s. 86.

beginning in any *house, chamber, stable, barn, or other building, or on any person's estate*. But this provision does not seem to extend further than to fires happening within the bills of mortality, and it seems to have been considered that innkeepers or carriers are not within the protection of this statute. (1)

Warehousemen
and wharfingers.

Of a *warehouseman or wharfinger* reasonable and common care of any commodity entrusted to his charge is exacted (2); he is not like an innkeeper and carrier bound by any custom of the realm, nor to be considered as an insurer, unless he also unite the character of a carrier (3); he stands therefore, in general, in the situation of an ordinary bailee for hire, and is therefore answerable only for ordinary neglect (4). He is not answerable for a theft committed by his servants, if he can prove that the goods were lodged in a place of security, and that he has not been guilty of positive negligence, nor exercised less care towards them than towards his own property. He is not answerable for destruction by rats, reasonable care having been taken to prevent such mischief (5). Neither is he liable for loss arising from robbery, accident, or fire (6), unless the same be occasioned by his gross default or negligence. In cases where the warehouseman or wharfinger has insured the property from fire, and it be burnt, and the warehouseman receive the amount of the insurance, the owner may recover from him (7). The responsibility of a warehouseman or wharfinger commences directly the goods are delivered into his custody. The responsibility of the warehouseman commences from the moment that his tackle is applied to the goods for the purpose of lifting them into the warehouse (8), and it is no excuse for the injury done in raising them from the cart or other vehicle, that the owner's agent, or carman, refused to secure them in the manner which the warehouseman pointed out. The responsibility ceases when the goods are delivered by the warehouseman or wharfinger out of his possession, according to the owner's express or implied directions. Where it is

(1) See 4 T. R. 581. 5 T. R. 389. 1 Stark. 72.

(2) Peake C. N. P. 114. 4 T. R. 581.; but see 5 T. R. 389. 4 Stark. 72.

(3) 1 Stark. 72. 5 T. R. 389.

(4) Jones, 96.

(5) Peake, 113. 1 Esp. Rep. 315. Cowp. 480.

(6) *Id. ibid.* 4 T. R. 581. It is a question whether a warehouseman by removing goods from the warehouse (for the use of which the owner pays warehouse room) to another is not liable for loss by fire. 2 Stark. 400.

(7) 2 Stark. 400.

(8) 4 Esp. Rep. 262. 5 Esp. 43.

proved to be the custom of wharfingers, when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or make any charge for shipping, the responsibility of the wharfinger ceases with the delivery to the mate, though the goods are lost before they are carried off the wharf (1). Wharfage seems only to be due when the goods are laid upon the wharf for the purpose of being loaded or unloaded; it differs from anchorage or mooring, which are charges incidental to the ship. In London the duty for wharfage and crantage is created by statute 22 Car. 2. c. 11., which directs that the amount thereof shall be regulated from time to time by the king in council (2). A wharfinger, having only the mere custody of goods, cannot by an unauthorized sale affect his employer. (3)

With respect to factors, attornies, auctioneers, and bailiffs, when their undertaking lies in feissance, and not merely in custody, more or less diligence is required, according to the nature of the business, and their reward is the reason of the obligation to use a degree of diligence adequate to the performance of the work (4). The question as to what amounts to reasonable care, is to be left to a jury to decide upon. (5)

3d. *Where property is bailed to be carried from place to place with reward to the bailee.* There are varieties of bailees of this description, but there is no substantial difference in their respective obligations, except indeed it be in the case of common carriers, of whom a greater degree of diligence over the thing bailed is required than it is of others.

3d. Where property is to be carried from place to place.

Any person undertaking for hire to carry the goods of all persons indifferently is, as to the liability imposed, to be consi-

Of common carriers.

(1) 5 Esp. 41.

(2) 3 Burr. 1409. 1 Bla. Rep. 423. This statute also enacts that a public wharf or key be left along the river side, from the Temple to London Bridge, forty feet wide, and that no vessels shall lie before the same longer than shall be necessary for the lading or unlading of goods, without the consent of the several wharfingers, and that it shall be lawful for all persons

to unload the same paying the wharfage. A wharfinger cannot, by unloading the goods against the consignee's directions, subject him to any charges for wharfage duties, &c.; see 4 T. R. 260.

(3) 15 East, 42, 3.

(4) Jones, 98. 4 Rep. 84. Lord Raym. 918. 1 Inst. 89. 1 Vent. 121.

(5) 4 Barn. & Ald. 202.

dered as a common carrier (1). No special agreement for the amount of the hire is essential to constitute this relation (2). A common carrier's obligation is founded more upon a public duty than the particular consideration for his undertaking (3). Masters (4) and owners of ships, hoymen, lightermen, barge-owners (5), ferrymen (6), proprietors of waggons, stage coaches (7), &c. are denominated common carriers (8), and by the custom of the realm, that is, by the common law (9), are bound to receive and carry (10) the goods of the subject for a reasonable hire and reward (11), to take due and ordinary care of them in their passage (12), to deliver them (13) safely, and in the same condition as when they were received, or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody, and which might have been prevented. It seems that every act which might have been provided against is a want of ordinary care, so as to render the carrier liable. It has accordingly been held, if a rat make a hole in a ship, and goods be thereby damaged, the carrier will be liable, as the carrier might have taken precaution to have prevented it (14). So if a carrier accidentally run the ship against an anchor under water, and the ship sink, he will be liable for loss arising from it (15). And a carrier is liable though he be robbed of the goods (16), or they be taken from him even by

(1) 1 Salk. 249. Cro. Eliz. 596. See Jeremy's Law of Carriers, 4. Selw. N. P. 393. 5 ed.

(2) Cro. Jac. 262. 2 Show. 81. 129.

(3) 2 Chitty's Rep. 1.

(4) 2 Lev. 69.

(5) 1 Roll. Ab. C. 2. 15. Jeremy, 7. Cro. Jac. 330. Hob. 18.

(6) Jeremy, 10. Aleyn, 93. 2 Bulst. 280.

(7) 4 Esp. Rep. 177. 2 Bos. & Pul. 419. 2 Show. 127. Jeremy, 11.

(8) Hackney coachmen are not common carriers, Jeremy, 13, 14. In some cases a wharfinger, where he can be considered as a common carrier, will be liable as such, 1 Stark. 72. 5 Burr. 2825. 5 T. R. 383. Aleyn, 93. Carth. 486. The

postmaster general and deputy postmaster are not liable as common carriers, 1 Salk. 17. Cowp. 754.; but a deputy postmaster is liable as a common mandatory, and may be sued for neglect in not delivering letters, &c. in due time, 3 Wils. 443. 2 Bla. Rep. 906. 5 Burr. 2711.

(9) 1 Roll. Ab. 2 (C.) pl. 1.

(10) 2 Show. 327. Selw. N. P. tit. Carrier.

(11) 2 Show. 81. Id. 129.

(12) See Jones, 102.

(13) Owen, 57. 2 Bla. Rep. 916. 5 T. R. 396.

(14) 1 Wils. 181.

(15) 3 Esp. 127. Selw. N. P. 395. Jones, 105.

(16) 1 Inst. 89 a. 1 Roll. Ab. 2 (C.) pl. 4. S. P. Gow. C. N. P. 115.

irresistible force (1), and he is always liable for the acts of his servants acting within the scope of his express or implied authority (2). A carrier is also considered in the nature of an insurer, wherein he differs from any other common bailee, who only engages to take the same care of the goods that a prudent man would do of his own, or to use ordinary care; and he is answerable even for inevitable accident while the goods remain in his custody as a common carrier (3); as where goods intrusted to a common carrier were consumed by an accidental fire, it was holden that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier. So where common carriers from A to B. charged and received for cartage of goods from a warehouse at B. (where they usually unloaded, but which did not belong to them) to the house of the consignee B., it was holden they were responsible for a loss by an accidental fire while the goods were in that warehouse, although they allowed the profits of cartage to another person, and that circumstance was known to the consignee (4). But where the goods are not remaining in the defendant's custody as a common carrier he is not liable; as where the goods had been carried by the defendant from A. to B., and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance, (the owner not paying any thing for the warehouse room,) and were consumed by an accidental fire, there it was holden that the defendant was not liable. (5)

The duties of carriers to London are in one instance pointed out by a legislative enactment called the *portage* act (6), by which it is enacted, that parcels arriving in town by any conveyance for hire other than stage waggons, between the hours of four in the evening and seven in the morning, shall be delivered within six hours after such hour in the morning, if arriving at any other hour of the day within six hours after such arrival, under a penalty not exceeding 20s. nor less than 10s. and every parcel arriving by any public stage-waggon shall be delivered within twenty-four hours after

(1) *Ld. Raym.* 919. 1 *Wils.* 181. *Hob.* 18. *Jeremy*, 31.

(2) *Bull. N.P.* 70 a. b. 2 *Stark.* 82. 1 *Price*, 284.

(3) 1 *T. R.* 33. *Lord Raym.* 916. *Stra.* 690. 5 *T. R.* 389.

(4) 5 *T. R.* 389. As to the statutes relieving persons against losses by fire, see *ante*, 367.

(5) 4 *T. R.* 581.

(6) 39 *Geo.* 3. c. 58. s. 4.

such arrival, (except directed to be left till called for), under a like penalty of 40s. (1). Every parcel so directed to be left is to be delivered upon demand, by a person properly authorized to receive the same, without any other charge but what is justly due for the carriage, and two-pence for the warehouse-room thereof, under a like penalty (2); if a parcel be not so directed, but before it is forwarded by the book-keeper, &c. in a course of delivery, if it be demanded by a person duly authorized to receive the same, it shall be thereupon delivered to such person, upon payment of the sum of two-pence for warehouse-room, and no more, under a like penalty (3). If a porter misbehave himself to any one, upon complaint to any justice of the peace within whose jurisdiction the offence has been committed or the offender reside, he may grant a warrant to bring before him such offender, and upon proof made upon oath of any such non-delivery, neglect, misconduct, or misbehaviour of such porter, &c. impose upon him a like penalty (4). This act does not extend to authorize the employment of any porter, &c. in the delivery of parcels within the city of London, contrary to the laws and usages of the city. (5)

But a carrier is not liable for any loss or damage arising from the act of God, as storms, tempest, or the like (6), or of the enemies of the king (7); unless indeed he act with so little precaution, or so foolishly or negligently, that he encounters and actually brings upon himself the effect of such act (8). Where the plaintiff put goods on board the hoy of the defendant, who was a common carrier, and coming through a bridge, by a sudden gust of wind the hoy sunk, and the goods were spoiled, Pratt, C. J. held the defendant not answerable, the damage having been occasioned by the act of God, for though the defendant ought not to have ventured to shoot the bridge if the general bent of the weather had been tempestuous, yet this being only a sudden gust of wind had entirely varied the case; and the plaintiff's counsel having offered some evidence, that if the hoy had been in a better condition it would not have sunk,

(1) 39 Geo. 3. c. 58. s. 5.

(2) s. 8.

(3) Id.

(4) s. 9.

(5) s. 12.

(6) Jones, 104. 1 T. R. 27.

5 T. R. 389. Stra. 128. Selw.

N. P. 395. Jeremy. 31. 5 East,

428. 1 Wils. 281.

(7) 3 Esp. 131. Jones, 104.

(8) See Stra. 128. 1 T. R. 27.

(6) Jones, 104. 1 T. R. 27. 2 Bulst. 280. 3 Esp. 74.

the C. J. said that a carrier was not obliged to have a new carriage for every journey, it was sufficient if he provided one, which, without any extraordinary accident, such as this was, would probably have performed the journey (1). So a carrier will be discharged from liability, by the deceit, fraud, or neglect of the bailor, as if the bailor use any representation or concealment amounting to fraud, or some artifice to make it appear that the parcel contains things of little or no value, when in fact it contains things of great value, the carrier will be discharged if they are lost (2); but though it is always advisable, and in cases where the carrier has given a notice limiting his responsibility actually necessary, to disclose to the carrier the value of the parcel, yet where no such notice has been given, and the bailor use no artifice to give the parcel containing things of value a mean appearance, and thereby to induce the carrier to think it of no value, the bailor need not, unless requested by the carrier so to do, disclose its value, and though the bailor should represent the thing delivered to the carrier to be of no value, yet if the carrier know it to be otherwise he will be nevertheless liable (3). So where the loss is occasioned by circumstances which should have been provided against by the owner, and not by the carrier, no action can be maintained against the latter, for such duty of the bailor is in the nature of a condition precedent; as in an action against a lighterman for damage done to rice by not being duly landed, it appearing that previous to its being landed it was necessary to obtain a permission from the custom house, it was held that as the obtaining such permit was no part of the lighterman's duty, but rather of the plaintiff's custom house agent, the plaintiff could not rely on the general liability of the defendant, without proving that it was his duty to have done that from the neglect of which the loss had arisen (4). So if the owner deliver goods so imperfectly packed, and the carrier does not perceive it, and a loss arises therefrom, the carrier will not be liable; but it would be otherwise if the carrier could *prima facie* perceive the imperfect manner in which the goods were packed. And where a grey-

(1) 1 Stra. 128.

(2) 4 Burr. 2298. 4 Barn. & Ald. 28. 41. Aleyn. 93. Carth. 485. Bull. N. P. 70, 6. Directing the parcel to a third person, who is not the owner, so as to prevent

its being known as really sent to a banker, is not a fraudulent concealment, 2 Barn. & Ald. 350.

(3) See 4 Barn. & Ald. 25. 32. Stra. 145. Bull. N. P. 70. b.

(4) 3 Esp. 74.

hound was delivered to a carrier, and was lost, the carrier was held liable, though the dog was not properly secured when delivered to him (1). If the bailment was made under such circumstances existing at the time as must necessarily be taken to have included a tacit stipulation that the bailee should not be considered as a common carrier, without which no reasonable man would have undertaken the conveyance, he cannot be made liable in that character (2); so if the bailor send his servant with the goods, who has the exclusive care of them, the carrier will in analogy to the law of innkeepers in this respect be discharged. (3)

Restrictions on
liability of car-
riers by water.

The legislature in some instances discharges and in others restrains the liability of carriers by water. Thus, by the pilot act (4), after compelling the masters and captains of particular ships to take pilots on board during certain parts of the voyage, in the 26th section, it is enacted, "that no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, by reason of no pilot being on board of any such ship or vessel, unless it shall be proved that the want of a pilot shall have arisen from any refusal to take a pilot on board, or from the wilful neglect of the master of the ship or vessel in not heaving to, or using all practicable means consistently with the safety of the vessel for the purpose of taking on board any pilot who shall be ready and offer to take charge of such ship or vessel;" and it is further enacted by the 27th section, "that no owner of any such ship or vessel shall be liable in any such cases for any loss or damage beyond the value of such ship or vessel and her appurtenances, and the freight due or to grow due for and during such voyage, wherein such loss or damage may happen to arise;" and again, by the 30th section, "that no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering

(1) 2 Stark. 323.

(2) 1 East, 604. Jones, 48.

(3) 1 Stra. 690. 2 Bos. & Pul.

406. 2 Bulst. 280.

(4) 52 Geo. 3. c. 39.

any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of any of the provisions of this act (1);” and it is further enacted by the 31st section, “that nothing in this act contained shall be construed to extend to deprive any persons of any remedy by civil action, against pilots or other persons, which they might have had if this act had not been passed.” By the 53 Geo. 3. c. 159. s. 1., the act being passed to amend and alter in some respects the 7 Geo. 2. c. 15. and 26 Geo. 3. c. 86., it is enacted, “that no person or persons who is, are, or shall be owner or owners, or part owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandize, or other things laden or put on board the same ship or vessel after the 1st Sept. 1813, or which after that day may happen to any other ship or vessel, or to any goods, wares, merchandize, or other things being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage;” under this section it has been held, that in an action against several defendants, as ship owners, for damage sustained by the loss of goods laden on board their ship, they were not liable in that character beyond the value of the ship and freight due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part owner, and that the value of the ship was to be calculated at the time of the loss, and not at the time of the commencement of the voyage, and that in calculating the value of freight due or to grow due, money actually paid in advance was to be included (2). By the 2d section of the same act it is further enacted, “that the value of the carriage of any goods, wares,

(1) As to the protection from 317, 8. in notes.
 liability for loss afforded by taking (2) 2 Barn. & Ald. 2.
 a pilot on board, see 6 Rob. Rep.

or merchandize belonging to the owner or any of the owners of such ship or vessel, and also the hire due or to grow due under or by virtue of any contract, whether made by or on the behalf of his majesty, or by or on the behalf of any other person or persons, or any body politic or corporate whatsoever, except only such hire as, in the case of a ship or vessel hired for time, may not begin to be earned until the expiration of six calendar months after the happening of such loss or damage, shall be deemed and taken to be, and shall be considered as freight within the intent and meaning, and for the purposes of this act, and also of the said acts of parliament made in the seventh year of the reign of his late majesty king George the second, and in the twenty-sixth of the reign of his present majesty;" and by the 3d section it is enacted, "that in case any such loss or damage shall arise or happen by more than one separate and distinct accident, act, neglect, or default, or on more than one occasion in the course or progress of a voyage, or after the end of any voyage, and before the commencement of another voyage, each and every such loss or damage shall be paid, compensated, and satisfied according to the provisions of this act, in such and the same way, and to the same extent, as if no other loss or damage had happened or arisen during the same voyage, or after the end of any voyage, and before the commencement of another voyage;" the 4th section enacts, "that nothing herein contained shall lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of his ship or vessel;" the 5th section enacts, "that nothing herein contained shall extend or be construed to extend to the owner or owners of any lighter, barge, boat, or vessel of any burthen or description whatsoever, used solely in rivers or inland navigation, or any ship or vessel not duly registered according to law." The act then proceeds to point out the owners remedies in case of these losses within the meaning of the act. By the 2d section of the 26 Geo. 3. c. 86. it is declared, "that the owners shall not be liable to answer for loss or damage occasioned by fire on board the ship;" and by the 3d section of the same act it is enacted, "that they shall not be liable to answer for loss or damage happening to any gold, silver, diamonds, jewels, watches, or precious stones which may have been shipped on board, by reason of robbery, embezzlement, &c., unless the shipper thereof insert in his bill of lading, or otherwise declare

in writing to the master, &c. the true nature and quality of such articles."

A carrier may, by express stipulation by *notice* to that effect, limit or *entirely* discharge his liability from all losses, either by robbery, accident, or otherwise, which do not arise from misfeasance or gross negligence (1), or provided the notice does not contravene the express provisions of an act of parliament, such as the portage act (2). But to exclude him from this responsibility by notice, the same must be proved to have been known and understood by the bailor or his servant at the time of the delivery of the parcel to the carrier. The knowledge by the bailor of this notice must therefore necessarily depend upon matter of fact. It is advisable for the carrier to use every precaution to make the bailor acquainted with it at the time of the delivery, and it would be safest for him, in all cases, expressly to mention to the bailor or his servant the terms under which he will carry the goods. In other respects no particular manner of giving this notice is required; it may be done by publicly affixing it up in large letters in the carrier's office, or by putting it in the public papers, or the gazette, or in printed hand-bills, or by any other medium by which the party with whom he deals is effectually apprized of the terms upon which he proposes to deal (3). Notice stuck up in the carrier's office, where the goods were delivered by a porter, is of no avail to the carrier if the porter did not read it, though in fact he could read and had seen the notice (4). So a notice stuck up in the office is insufficient where the party cannot read (5). A notice in a newspaper is not sufficient unless the carrier can prove that the plaintiff read the paper and the notice itself; but notice in the gazette, it is said, is *prima facie* evidence of the bailor's having read it (6). In all these cases it is a question for a jury whether or not the party was not made acquainted with the notice; and where it is highly probable that the bailor must have been acquainted with the notice, as if he has, in the usual course of dealing between him and the carrier, repeatedly received such notices limiting the carrier's responsibility, he will be *prima facie* bound by the notice (7).

Of notices
limiting liability

(1) 1 Hen. Bla. 298. 4 East, 279. 2 Campb. 108.
370. 5 East, 507. Ayleyn, 93. (4) 2 Stark. 53. Holt C.N.P.
1 Gow. C.N.P. 115. 1 Stark. 645. note.
72. (5) Id. 279.
(2) As to this act see ante, 371. (6) 1 Stark. 186.
(3) 3 Campb. 27. 2 Stark. 53. (7) 1 Hen. Bla. 198.

The notice should also be given at the time of the delivery of the goods. A notice stuck up at the carrier's office, situate at the *termini* of the journey, will not be of any avail to him when the goods are delivered to him at an intermediate place where no notice is stuck up or given (1). A notice once given is always operative till it be withdrawn (2).

These notices are generally construed as strictly as possible against the carrier. And where a carrier gave two different notices, it was held he could only avail himself of the one the least beneficial to him (3). A loss arising from the personal default of the carrier is not within the scope of such notice, which is meant to exempt the carrier from losses by accident or chance (4). And if the carrier misdeliver a parcel he is still liable, though notice be given limiting his responsibility from losses (5). When a carrier can bring the knowledge of this notice plainly and clearly to the mind of the party who deals with him, he is exempted from liability, where the goods are of a much larger value than, from a knowledge of their bulk and quality, he could possibly guess them to be; but this exemption does not apply to goods the value whereof the carrier knows, or from their bulk and known quality the carrier has very obvious means of knowing (6). The word "glass," &c. written on any package is a sufficient notification for this purpose (7). A carrier may waive the benefit of a notice limiting his responsibility by an express subsequent promise to make good the loss; but a promise by the book-keeper of a carrier to make good such loss is not binding on the carrier, unless the book-keeper be his general agent. (8)

A carrier always continues liable to answer for the consequences of misfeazance or gross negligence of himself or his servants, and no express stipulation or notice will exempt him from it, though the bailor do not comply with such notice (9). It is a question of fact necessarily depending on the circumstances of each particular case, as to what will amount to this

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| (1) Holt C.N.P. 317. | 527. 1 Price, 280. 4 Price, 31. |
| (2) 2 Maule & S. 1. | 4 Barn. & Ald. 41. |
| (3) 2 Stark. 255. | (7) 3 Campb. 527. |
| (4) 5 East, 428. | (8) 2 Stark. 181. |
| (5) 2 Barn. & Ald. 369. | (9) 10 East, 244. 2 Barn. & |
| (6) 16 East, 244. 4 Campb. 40. | Ald. 356. 1 Price, 280. 4 Price, |
| 1 Gow. C. N. P. 105. 3 Campb. | 31. |

misfeasance or gross negligence (1). The misdelivery (2), or nondelivery within a reasonable time (3), of a parcel, is a misfeasance for which the carrier is liable, though he give this notice. So is the sending a parcel by a different coach than that directed by the bailor (4). So is the removing it into another carriage (5). So, if goods are sent by water to be carried to a certain place, and they are carried by the carrier beyond the place, and are lost, the carrier will be liable, notwithstanding he limit his responsibility by notice (6). In these cases the loss arises from the wrongful act of the carrier, wholly inconsistent with the contract he entered into to carry the parcel (7). Where a parcel is directed to a person at a particular place, and the carrier knows such person, and he delivers it to another person, representing himself to be the consignee, such delivery is gross negligence on the part of the carrier, and he will be liable whether the bailor had notice or not (8). And so, if a parcel be directed to be left till called for, or be directed to a consignee at a large town, without the name of any street, and the carrier delivers it to one who told him that he had been sent for it by a person whom he did not know, but who was in the street, the carrier will be chargeable for this as gross negligence (9). A parcel having been sent from Worcester to London, arrived in London, and was taken from the coach office of the defendants in a cart, under the direction of one person only, for the purpose of delivery, the servant left the cart unprotected in the street, while he went to different houses for the purpose of delivering other packages, and the parcel was lost out of the cart: in an action against the carrier for the loss, it was held that notwithstanding the notice they were liable (10). So where the carrier received a cask of brandy, which leaked in the course of the journey, the waggoner was informed of it, but took no step to prevent the leakage, and a considerable quantity of the brandy was lost, it was held the carrier was liable for gross neg-

(1) Holt, C. N. P. 643.

& Pul. 16. 1 Campb. 451.

(2) Peake, C. N. P. 49. 4 T. R. 260. 5 Burr. 2825. 2 Barn. & Ald. 356. 703. 4 Price, 31. 3 Brod. & B. 181.

(4) 5 Barn. & Ald. 342.

(5) 5 Barn. & Ald. 53.

(6) 8 T. R. 531. 4 Price, 31.

(7) See 5 East, 428.

(8) 3 Brod. & B. 177.

(3) 5 T. R. 389. 3 Wils. 429. 2 Bla. Rep. 916. Allen, 93.

(9) 2 Barn. & Ald. 356.

Owen, 57. 2 Esp. 693. 5 Esp. 41. Peake, C. N. P. 140. 1 Bos.

(10) 2 Moore, 18. Holt C. N. P. 643.

ligence, notwithstanding a notice was given by him (1). The leaving of a coach improperly guarded, for half an hour, in the middle of a street in the night, and during which time a parcel is stolen, is a degree of gross negligence for which the carriers would be liable (2). It is a question to be left to a jury whether the bailor, by concealing the fact of a parcel being of great value, does not thereby commit a fraud, or such a deceit upon the carriers as to exclude them from responsibility, even for more than ordinary negligence, where a notice has been given by the carrier, that he would not be answerable for parcels of value, unless entered and paid for as such, and the bailor does not enter or pay for them as such. (3)

A carrier's liability *commences* from the time the goods are actually delivered to him in the character of a carrier (4). Where the goods are left for a carrier in an inn-yard or warehouse at which other carriers put up, it will not be considered a delivery so as to charge him, without a special notice of their being so delivered, or some previous instructions to that effect (5). If goods be delivered to a party who might be considered under the circumstances of the bailment either a warehouseman or a carrier, he must be sued accordingly in his proper character (6). In order to charge a carrier, the goods should be delivered either to himself or his authorized agent. Porters and warehouse receivers, &c. though they receive a separate charge for their trouble, are the carriers servants (7). The delivery of a parcel to the driver of a stage coach to be carried in the character of a servant, and not on his own personal account, is a sufficient delivery to render the master liable (8). If the owners of a ship have chartered it to a third person, the captain must for that voyage be taken to be the agent of the latter for goods delivered to him (9), and the owners cannot, *hac vice*, be made liable for his acts; but where goods sent to a wharfinger are by him delivered to and received by the mate of the ship, it will be a good delivery to charge the shipowners, though the

(1) 16 East, 247.

(2) 4 Barn. & Ald. 21.

(3) 4 B. & A. 21. Holt, C.N.P. 643.

(4) 4 Esp. 262. 5 Esp. 43.

(5) 1 Lord Ray. 46. 3 Camp. 414.

(6) 2 Stark. 461. As to cases in

which a person is to be considered warehouseman, wharfinger, or carrier, see 4 T. R. 581. 5 T. R. 389. 2 Stark. 72.

(7) 5 T. R. 389.

(8) 2 Stark. 82.

(9) 3 Esp. 27.

goods are lost before actually placed on board. By such delivery the wharfinger's responsibility being determined, the obligation of the owner *eo instanti* arises (1). Where the carriage is by means of the post office, it will not be a sufficient delivery to make the consignee liable for the loss, if the letter was only given to a bellman; but it is otherwise of a servant usually employed by a carrier to receive or fetch goods to be carried. (2)

A carrier's liability *ceases* when he vests the property committed to his charge in the hands of the consignee or his agents by actual delivery, or when the property is resumed by the consignor, in pursuance of his right of stopping them *in transitu*. It is the carrier's duty always to deliver the goods, and even if it were not so, he would be bound by any general course of trade to give notice to the consignee of the arrival of the goods (3); and we have before seen that he would be liable for a non-delivery (4). The leaving goods at an inn is not a sufficient delivery (5). The known usage of a hoyman to ply to a particular wharf, will not exempt him from this obligation, nor will the delivery of the goods at that wharf be a discharge of his duty (6). So where common carriers from A. to B. charged and received for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unloaded, but which did not belong to them, it was held their liability did not cease on the arrival of the goods at the warehouse, though they allowed all the profits of the cartage to another person, and that circumstance was known to the consignee (7). The rule in these cases, to decide upon the determination of a carrier's liability, is always to consider whether any thing remains to be done by the carrier in his character of carrier; if nothing remains to be done, his liability as such ceases. The usual liability of a carrier may in some degree be limited by usage, or by a special contract entered

(1) 5 Esp. 41. Jeremy, 62.

(2) Peake, C. N. P. 186.

(3) 3 Wils. 429. 2 Bla. R. 916.

(4) Ante. 370. 379.

(5) Selwyn, N. P. tit. Carriers.

(6) 2 Esp. 693. 5 Esp. 41.

This rule can only extend to cases where hoymen are common carriers, and not acting under terms of a bill of lading, where the place of delivery is more particularly

specified. Thus, in the case of goods brought by ships from foreign countries, the bill of lading is merely a special undertaking to carry from port to port; according therefore to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the owners. Jeremy, 66. 5 T. R. 389.

(7) 5 T. R. 389. 1 Price, 328.

into between him and the owner of the goods; and where A., B., C., and D., being in partnership as carriers, entered into an agreement with S. and Co., to carry goods for them from London to Frome, where they should be deposited in the warehouse of A., the resident partner, till S. and Co. should be ready to receive them into their own. The goods having been forwarded, were, after they had been deposited in A.'s warehouse, destroyed there by fire. It was held that the liability of A., B., C., and D. as carriers ceased on the arrival of the goods at Frome, and that when they were deposited in A.'s warehouse, they could only be considered as warehousemen (1). So where a consignee, having no warehouse of his own, directs the carrier to let them remain in his waggon office until the consignee removes them, in such case the carrier's liability ceases on the arrival of the goods at the waggon office (2); and where a common carrier between A. and B., employed to carry goods from A. to B. to be forwarded to C., carried them to B., and there put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them, he was held not answerable for the loss (3). In the river Thames, the liability of the master, by the custom, continues whilst the goods are delivering into a lighter sent by the consignee to receive them, until the loading is completed (4). Where the shipowner or master cannot deliver the goods, from their being wrongfully detained by revenue officers, his liability nevertheless continues, inasmuch as he has a remedy over against the officers for such illegal detention. (5)

A common carrier is always, unless there be an express agreement to the contrary, entitled to a *reward* for his care and trouble. In some cases, his reward is regulated by the legislature, and in others, by a special stipulation between the parties; and even if there were no legislative provision or express agreement, he could not claim more than is reasonable for his trouble (6). By the statute 2 and 3 W. & M. c. 12. s. 24., which may be considered as still in force (7), after reciting that divers

(1) 2 Moore Rep. 500., and see
1 T. R. 27.

(2) 1 Moore, 526.

(3) 4 T. R. 581.; but see 5 T. R.
389. 1 Stark. 72.

(4) Peake, C. N. P. 140. 1 Bos.
& P. 16.

(5) 1 Camp. 451.

(6) 3 Taunt. 264.; see Cro. Jac.
262. 2 Show. 81. 129.

(7) See Mr. Jeremy's observa-
tions on this point, page 112. 6
T. R. 17. 3 Taunt. 264.

waggoners and other carriers, by combination among themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade; be it therefore enacted by the authority aforesaid, that the justices of the peace of every county and other place within the realm of England, or dominion of Wales, shall have power and authority, and are hereby enjoined and required, at their next respective quarter or general sessions after Easter-day, yearly to assess and rate the prices of all land-carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common waggoner or carrier, and the rates and assessments so made to certify to the several mayors and other chief officers of each respective market town, within the limits and jurisdictions of such justices of the peace, to be hung up in some public place in every such market town, to which all persons may resort for information; and that no such common waggoner or carrier shall take for carriage of such goods and merchandizes above the rates and prices so set, upon pain to forfeit for every such offence the sum of five pounds, to be levied by distress and sale of his and their goods, by warrant of any two justices of the peace where such waggoner or carrier shall reside, in manner aforesaid, to the use of the party aggrieved (1). The rates for the carriage of goods, &c. to be taken by common carriers, innkeepers, and other persons, within the cities of London and Westminster, the borough of Southwark, and places adjacent, are regulated by the 39th Geo. 3. c. 58. (2). The

Porterage acts.

(1) Though no rate be fixed by order of sessions, the price of carriage cannot be more than is reasonable, 3 Taunt. 264.

(2) By the first section of this statute, it is enacted, that from and after the 5th July 1799, no innkeeper, warehousekeeper, or other person to whom any box, parcel, &c., or other thing whatsoever not exceeding 56lbs. weight is brought by any stage, waggon, or cart, or any public stage coach or carriage, or any porter or other person employed by such innkeeper, &c. in the portorage or delivery of any such box, &c. within the cities of London and Westminster, and the borough of Southwark, and the

suburbs and liberties thereof respectively, and other parts contiguous thereto, not exceeding the distance of half a mile from the end of the carriage pavement in the several streets and places within the said cities, &c. shall ask or demand, or receive or take in respect of such portorage or delivery, any greater rate or price than the several rates or prices herein-after mentioned; that is to say: For any distance not exceeding a quarter of a mile, 3d.; For any greater distance than a quarter of a mile, but not exceeding half a mile, 4d.; For any greater distance than half a mile, but not exceeding one mile, 6d.; For any greater distance than one mile, but

we have before seen, is by the common law compellable to undertake the carriage of the goods, &c. of all persons indiscriminately, and is in general responsible for injuries arising from acts against which he could not provide; but this is not so with a person who carries goods only for particular individuals, and who is only liable as a common mandatory in the above second species of bailment (1). The observations therefore under that species of bailment will be here applicable. A special carrier may, as in the case of a mandatory as well as a depositary, bind himself by a special agreement to be answerable even for casualties, but he is always liable for gross neglect.

It is the common practice of shipowners and others, who, as we have before seen, are common carriers, and liable as such, to protect themselves from this liability, by entering into some special agreement with the owner of the goods for their conveyance. This agreement with the owners of vessels is usually under the form of a charterparty of affreightment, or bill of lading, which will be considered in the following chapter.

offender the overplus of such distress, if any there be, after deducting the charges of making the same. Eleventh, that no person shall be prosecuted for any offence against this act, unless information of such offence be given to a justice of the peace within fourteen days next after the commission of such offence. Twelfth, that nothing

in this act contained shall extend or be construed to extend to authorize the employment of any porter or other person in the portage or delivery of parcels within the city of London, contrary to the laws and usages of the said city.

(1) Ante, 358. See 2 Lord Raym. 909.

CHAP. IX.

Of Charterparties, Bills of Lading, Freight, Passage Money, Demurrage, Primage, Privilege, and Average.

HAVING completed our inquiries into the various principles and decisions relating to the contracts between the manufacturer, the vendor, and the purchaser, and bailees of different descriptions, it next occurs, in the natural order of this work, to consider those parts of our mercantile laws which relate to the conveyance of the commodity from the vendor to the purchaser, and the insurance of it from loss during its passage. Under the first of these heads, we shall have to consider one of the description of bailments before alluded to, viz. *carriers by water*, and the law relating to *charterparties, bills of lading, freight, passage money, demurrage, primage, privilege, and average*.

It sometimes happens, that the purchaser brings home the commodity himself; but it is much more usual, particularly in foreign commerce, to employ a third person for this purpose.

I. Of Charterparties. (1)

A merchant who has purchased commodities, and who usually confines his capital and attention to *wholesale trade*, seldom has a ship of his own at command to bring home the goods which he has purchased. He therefore resorts to some person who has employed his capital and attention peculiarly in the carrying trade. (2) If the quantity of the commodities purchased be very considerable, or the merchant is desirous of making a speculative voyage to foreign parts, to purchase various commodities in one or more ports, he then hires an *entire* ship; if, on the other hand, the commodity is not sufficient to occupy an entire ship in general, he merely contracts with the shipowner to carry the particular commodity to the port of destination. In the first case, it is usual to enter into a formal contract for the *hiring* of the *entire* ship for some certain voyage, or for a limited period, and this

(1) See, as to charterparties in general, the present Lord Chief Justice Abbott's Treatise on the subject of Shipping in general, p. 183, &c.; also Mr. Holt's, vol. 2. p. 1.; and Mr. Lawes's Treatise on Charterparties, per totum.

(2) As to this separate department of trade in general, see ante, 1 vol. 7, S.

contract is usually termed a *charterparty*, and the ship is termed a *chartered* ship; in the latter instance, where the entire ship is not hired, she is termed a *general* ship: and it is not then usual for the merchant to sign any contract, but the captain of the vessel usually, and in particular in the course of foreign trade, signs an acknowledgement of having received the goods on board the ship, with a stipulation that the goods shall be safely carried, and which contract is called a *bill of lading*. We will first consider the law relative to *charterparties*.

Definition, and parties to it.

A *charterparty of affreightment* (from *charta partita*) (1), may be defined to be an agreement in writing under seal, or otherwise, between the owner or the master of a ship, and the hirer or the owner of goods, by which the owner or master of the ship agrees to let the same, or the principal part thereof, (though generally the whole ship) to the hirer or owner of goods, for the conveyance of them to some destined place or places, such owner of the goods paying freight. This instrument may be entered into by any agent sufficiently authorized on behalf of the owners of the ship, or the owners of the goods. Generally this charterparty is under seal, in which case the remedy thereon is debt or covenant (2). But sometimes a printed or written instrument is signed, called a *memorandum of charterparty*, and not under seal, which, if a formal charterparty is not afterwards executed, will be binding on the parties (3). The stamp in either case, whether the contract be under seal or not, is the same (4). The master of the ship may be considered as a sufficient agent for this purpose to bind the owners if the charterparty be not under seal; but if he execute one under seal, without being authorized by deed or letter of attorney under seal, he will be personally responsible, and even if he be authorized to do so by deed, and he do not express in the face of the charterparty that he acts and executes the same as agent, he will be personally responsible (5). When the ship is chartered by several owners to several persons, the charterparty should be executed by each, or they will not be liable to an action for nonperformance of the stipulations; and though we have seen, for various mercantile purposes, one partner may bind his copartner by signing his name to an instru-

(1) Co. Lit. 229.

(4) 55 Geo. 3. c. 184. Sched.

(2) *Alley v. Parish*, 1 New Rep. part 1. tit. Charterparty. 104.

(5) 7 T. R. 207. 2 East, 142.

(3) See form of one, 13 East, 1 New Rep. 104. ante. 211. 343. and post; 4 vol.

ment not under seal, it is otherwise with respect to instruments under seal (1), unless authorized by an instrument of as high a nature.

No precise form of words or stipulations are requisite in a charterparty, though for the most part the chartered companies and the public boards and merchants use particular forms; and even these must in many cases be necessarily varied to suit the intention of the parties (2). The charterparty should commence by naming the parties between whom it is made (3), and describing the owners as such. It is usual to mention the burthen of the ship, in order to shew what quantity of cargo it will take within the meaning of a full and complete cargo (4). A mistake in the amount of the burthen may, in some cases, be prejudicial to one party or the other, and especially to the owner if he covenant to load a cargo equivalent to the burthen as described in the charterparty, or if from circumstances it can be made appear to be a wilful misrepresentation (5). The situation of the vessel at the time of entering into the charterparty is usually described. It then proceeds to let the vessel or part of it to the merchant for the voyage or voyages, and to specify the freight either in a gross sum for the whole voyage, or a particular sum for every month or week of the ship's employment, or at so much per ton, cask or bale of goods, and so in proportion for a less quantity (6). The deed then stipulates on the part of the owner or master, that the ship shall be seaworthy, and in a condition to carry the

Form and provisions of charterparty.

(1) Ante 239. *Cooker v. Child*, 2 Lev. 74. *Gilly v. Copley*, 3 Lev. 138.

(2) A variety of forms of charterparties, post, 4 vol.

(3) If a charterparty is expressed to be made between certain parties, as between A. and B., owners of a ship, whereof C. is master, of the one part, and D. and E. of the other part, and purports to contain covenants with C., nevertheless C. cannot bring an action in his name upon the covenants expressed to be made with him, nor give a release of them, even though he seals and delivers the instrument, (2 Inst. 673.); but if the charterparty is not expressed to

be made between parties, but runs thus, This charterparty indented witnesseth, that C., master of the ship W., with consent of A. and B., the owners thereof, lets the ship to freight to E. and F., and the instrument contains covenants by E. and F. to and with A. and B., in this case A. and B. may bring an action upon the covenants.

(4) This was absolutely necessary by a French ordinance, see Molloy, b. 2 ch. 4. s. 8.

(5) See 2 Barn. & Ald. 421. 2 Stark. 452. *Abbott on Shipping*, 188.

(6) As to the necessity of this, see 2 Lev. 124.

goods, and shall be provided with all necessaries for the intended voyage, both on departure and in the course of it; that the vessel shall be ready by an appointed day to receive the cargo, and shall wait a certain number of days to take it in; that the owner will receive on board, and stow in a proper manner, the cargo; and that after having received it, she shall sail upon the destined voyage with the first fair wind, and shall deliver the goods (certain perils and accidents excepted) at the destined port, to the freighter or his assigns, in as good condition as they were received on board. On the part of the freighter, he contracts to furnish a cargo, and to load and unload the goods within a reasonable time. The times stipulated for that purpose, commonly called lay or running days, are explicitly expressed, as well as the times appointed for the payment of the freight, and the manner of such payment, and the rate of payment (commonly called demurrage) *per diem*, in case of the vessel's detention beyond her lay or running days. The deed then generally concludes with a penal clause, binding the master or owner, and the ship, tackle, and furniture, and sometimes the freight, and the merchant and his goods, in a certain sum, to the performance of the several covenants in the charterparty. (1)

But, although these are the usual stipulations in a charterparty, there is nothing to preclude the owner on the one side, or the merchant on the other, from adding other special conditions, which in all cases are binding on the master or owner. (2)

Such are the usual terms and contents of a charterparty: we will, in the next place, consider the *construction* and legal operation of every part of this instrument, except as to the payment of freight and demurrage, which, from its importance, will require a separate inquiry.

Construction of
charterparties in
general.

The general rule of law, adopted in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties,

(1) See 2 Holt on Shipping, 8. As to this penal clause, see post, 4 vol. page 2. It would in many cases be better to insert clauses for stipulated or fixed damages, see *id.* page 3.
(2) See *Beatson v. Shaak*, 3 East, 233. See Holt on Shipping, 2 vol. 6.

and conformable to the usage of trade in general, and of the particular trade to which the contract relates. (1)

Though the words of a charterparty may in most cases receive a liberal construction, yet the construction must not be inconsistent with their *plain and obvious meaning*; and the courts will not, in general, relieve against express and positive stipulations, though, *per se*, hard and absurd (2). A charterparty, as in the case of other contracts, cannot be varied in its terms by any additional facts or evidence (3). The contract by charterparty is in general reciprocal; that is, mutually obligatory upon each party; but nevertheless the parties may, by particular clauses, render it obligatory on one, and optional on the other, or in other words, make the performance a condition precedent. After stating the various acts to be performed by the shipowner or master, the different engagements of the hirer of the ship are introduced by these words: "*In consideration whereof, and of every thing above-mentioned, the freighter covenants, &c.*" In the construction of the charterparty, these words are not considered as rendering the performance of *every* previous stipulation on the part of the shipowner or master a condition precedent; and if the voyage has been performed, the owner may recover the freight, though some of the stipulations have not been performed (4). The delivery of an outward bound cargo is not in general a condition precedent to the providing a return cargo; and it has been held, that where the covenant on the part of the shipowner was to proceed to Naples, and there to deliver the outward cargo, and having so done, to receive on board a return cargo, yet that the delivery of the outward cargo was not a condition precedent to the providing of a return cargo (5). And where by charterparty (6) between the shipowner and freighters, the shipowner covenanted to take on board six pipes of brandy at Havre, and therewith proceed to Terciera, and there take on board a complete cargo of fruit or other goods as the freighters might think fit, and proceed to London or Bristol as might be ordered by the freighters,

(1) As to the construction of contracts in general, see ante, 106. 2 Bos. & P. 164. 2 Ves. 331. See *Donaldson v. Foster*, post.

(2) See ante, 3 Burr. 1637. 1 Esp. 367. *Abbott*, 223.

(3) See ante, 8 Taunt. 254. 6 Taunt. 446. 2 Marsh. 141. S. C.

(4) 12 East, 389.

(5) 3 M. & S. 308.

(6) 8 Taunt. 576.

and there make a right and true delivery of the fruit, &c., and the freighters covenanted to pay certain freight for the fruit and the brandy, the freight of brandy, &c. to be taken out in fruit at Terciera, and guaranteed the ship a full cargo home, it was held that the covenant to take the brandy to Terciera was not a condition precedent, but a distinct and independent covenant, and therefore the owner, in an action of covenant on the charterparty against the freighters for not putting a full cargo of fruit on board at Terciera, having averred general performance, the declaration was held good on demurrer.

A charterparty, as in the case of other deeds, begins to take effect from the day on which it is sealed and delivered, and not from the day on which it bears date, if different from the day of the delivery, unless there be words of reference *to the day of the date*. (1)

The owners
covenant sea-
worthiness.

The usual covenant, that the ship shall be seaworthy, and in a condition to carry the goods, comprehends every thing relating to the ship, and therefore the owners must be prepared with and complete every thing to commence and fulfil the voyage (2); but even supposing the charterparty did not contain this covenant, the owner of the vessel would be, by common law, as a carrier, bound to take care that the ship should be fit to perform the voyage (3); and even though he should give notice, limiting his responsibility from losses occasioned to any cargo put on board his vessel, unless such loss should arise from want of ordinary care, &c., he would be liable if his ship were not seaworthy (4). If a ship have an insufficient bottom, or unsound timbers, or is without knees (5), it is not seaworthy; but to constitute a ship unseaworthy, she must be so at the time of her departure (6); though this unseaworthiness will in most cases be presumed, where the ship becomes leaky during the course of the voyage from no particular cause, and especially if it becomes so very shortly after the commencement of the voyage. (7)

Owner's cove-
nant as to things
necessary for
voyage.

A covenant by the owner, "that the vessel should be sufficiently furnished with every thing necessary and needful for the

(1) Cro. Jac. 263. See 4 East, 477. 3 Lev. 348.

(2) See 2 Holt on Shipping, 77. 6 Taunt. 65. 12 East, 381. 4 Camp. 119. 3 East, 283.

(3) 2 Lord Raym. 909.

(4) 5 East, 428.

(5) 1 Dow. 32.

(6) Dougl. 732. 1 Dow. 336.

2 Holt on Shipping, 83.

(7) Park on Insurance, 333. 2 Dow. 23.

voyage in question," which was to Cagliari in Sardinia, was held to be broken by not sending a bill of health on board (1). So, the ship should be furnished with ground tackling sufficient to encounter the ordinary perils of the seas (2), and with good sails to enable her to proceed with expedition (3); so, under this covenant, the owner is bound to have a sufficient crew, and a captain of competent skill (4); so he is bound to have a pilot on board, when necessary by the usage of trade or the laws of the country, and in case of his neglect or refusal to take one, he will be liable. (5)

If the ship be not ready by the appointed day, and the charterer has derived no benefit from the charterparty, he may rescind it *in toto*, and procure another ship for the conveyance of his goods; and if he has shipped part of his goods, he may ship the remainder of them on board another ship, and recover damages against the owners. (6)

Owner's covenant to be ready to sail, &c.

The manner in which the owner is to lade the cargo is for the most part regulated by the usage and custom of the place where he is to lade it, unless indeed there be any express stipulation in the charterparty directing it (7); so the owner is bound by the charterparty to stow and arrange the different articles of which the cargo consists, in such a manner that they will not be injured by each other, or by the motion or leakage of the ship; and even without any covenant in the charterparty to stow in a proper manner, the owner would be bound by an implied contract, and by common law to do so (8). He should not lade any part of the goods on the deck of the vessel, unless the merchant consent to it. It is in all cases the duty of the master or owner to provide ropes, &c. proper for the actual reception of the goods into the ship; and if a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss; the ship must also be furnished with proper dunnage, or pieces of wood, &c. placed against the sides and bottom of the hold, to preserve the cargo from the effects of leakage, according to its nature and quality;

Owner's covenant as to manner of lading, stowing, &c.

(1) Holt, C.N.P. 167. 4 Camp. c. 104. 52 Geo. 3. c. 39. ante. 389. 1 Stark. 212.

(2) 3 Dow. 57.

(3) 1 Camp. 1.

(4) 7 T. R. 160. Selw. N. P. 5 Esp. Rep. 41. 1 Vent. 190. 238. 337, note.

(5) See 7 T. R. 160. 48 Geo. 3. son, 282.

(6) Cro. Car. 383. 3 Lev. 283.

1 Beawes, 188.

(7) See 2 Holt on Shipping, 86.

(8) See 4 Camp. 119. 1 Wil-

and care must be taken by the master (unless by usage or agreement this business is to be performed by a person hired by the merchant) so to stow and arrange different articles, of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship, and more must not be taken on board than the ship can conveniently carry, and for the proper working of the vessel.

Owner's covenant to load a full cargo.

Under a covenant by the owner to load a full and complete cargo, the master must take so much on board as he can do with safety, and without injury to the vessel. If the covenant is to load a full cargo according to the burthen of the ship, as described in the charterparty, and the burthen turn out to be less than that described in the charterparty, the owners may be liable in damages (1); but the description in the charterparty of the burthen of the vessel will not in general govern the quantity of goods to be stowed on board. (2)

What the master may take with him, and as to his liability or receiving the goods.

The master cannot take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture or detention, and the master must take on board no false or colourable papers that may subject the ship to capture or detention, and he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo by the law of the countries from and to which the ship is bound, and by the law of nations in general, and treaties between particular states. Where it was stipulated by a charterparty that the merchant should have the *exclusive* use of the ship outwards, and the *exclusive* privilege of the cabin, the master not being allowed to take any passengers, on the trial of an action against the owner for a breach of this stipulation, evidence was allowed to explain, that under a charterparty so worded it was the constant usage of trade to allow the master to take out a few articles for a private trade, and that this was therefore the implied understanding between the parties at the time of executing the charterparty. (3)

If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt

(1) See 2 Barn. & Ald. 421.
2 Stark. 452.

(2) Id. *ibid*.

(3) Donaldson v. Forster, M. T.
29 Geo. 3. Abbott, 4 ed. 222.
note 2.

in the port of *London*. With respect to goods intended to be sent coastways, it has been held, that the responsibility of the wharfinger ceases by delivery of them to the mate of the vessel *upon the wharf*; and as soon as any goods are put on board, the master must provide a sufficient number of persons to protect them, for even if the crew be overpowered by a superior force, and the goods taken while the ship is in a port or river within the body of a country, the master and owners will be answerable for the loss, although they have been guilty neither of fraud nor fault; the law in this instance holding them responsible from reasons of public policy, and to prevent the combinations which might be made between thieves and robbers.

The master must, according to the terms of the charterparty, commence the voyage without delay, as soon as the weather is favourable, but not otherwise. Where the owner or master covenanted that his ship should sail with the first wind on a voyage to Cadiz, and the merchant covenanted that if the ship should go on the intended voyage, and return to the Downs, he would pay a certain sum, it was held (2), that though the ship did not sail with next wind, yet that the substance of the covenant and primary intention of the parties were, that the ship should perform the voyage, and not that the ship should sail with the next wind, which changes every hour, and that the ship having arrived in the Downs, the merchant should pay the money; but although it appears by this case, that the owner will not absolutely lose his freight by a delay in the commencement of the voyage, if the voyage be afterwards performed, yet if the merchant sustain any injury by such delay, he will be entitled to a compensation in damages proportioned to his loss (3). Where by the terms of the charterparty a number of days is appointed for the *lading* of the cargo, either generally and without payment on that particular account by the merchant, or by way of demurrage, the master must not sail before the expiration of the time.

Owner's liability
as to commence-
ment of voyage.

(1) Palmer 397. See also 4 East. 477. Abbott, 204.

(2) As to in what cases the owner is entitled to the whole freight, in case of a deviation from the charterparty, and the merchant is driven to his remedy for damages

by cross action, see 1 Campb. 377. 4 Campb. 112. 119. 10 East. 555. 295. 12 East. 381. Abbott, 205. And see ante, 151, as to when a contract is rescinded by a total failure of consideration.

Owner's liability
as to sailing with
convoy, &c.

If there has been an undertaking or warranty to sail with convoy, the vessel must repair to the place of rendezvous for that purpose; and if he neglects to proceed with convoy, he will be liable for all losses arising from the want of a convoy. The convoy must be a ship or ships of war appointed by the government, that is, immediately by the government, or by the commander in chief on a particular station. The protection of a ship of war accidentally bound on the same voyage, although discharging the office of a convoy, is not a convoy within the meaning of a covenant to sail with one (1). This covenant to sail or depart with convoy, does not mean that the vessel shall depart with convoy immediately from the lading port, but only from the place of rendezvous appointed for vessels bound from that port (2); neither does it require the vessel to sail with convoy to the precise place of destination, but only as far as the convoy appointed for vessels of that destination goes (3); but the vessel must continue with the same convoy during the voyage, and cannot, unless actually compelled by inevitable necessity, take another convoy (4); and it is the master's duty, before his departure under convoy, to obtain the commodore's instructions and orders to the convoyed vessels (5); but if the master do all in his power to obtain them, but is prevented so doing by the badness of the weather (6), or if the commodore refuse them (7), he will not be liable for not having obtained them.

Owner's liability
as to course of
ship.

The owners or master should sail with the ship with all practicable dispatch, and by the usual and shortest course, unless in case it is bound to proceed under convoy, when they should follow the convoy as far as possible. Sometimes this course is pointed out in the charterparty, but in its absence, it will be always a question for a jury to decide, what course the ship should pursue: in some cases he may indeed make a deviation from the usual course, as for the purpose of repairs, or for avoiding an enemy, or the perils of the seas (8). Where the master

(1) See Abbott, 237, 238. *Hibbert v. Pigou*, Park on Ins. ch. 18.

(2) 2 Salk. 443. 2 Stra. 1265.

(3) Abbott, 239. 2 Hen. Bla. 551.

(4) Doug. 72. Cartl. 216. 3 Lev. 320.

(5) 1 Bos. & Pul. 5. 2 Bos. & Pul. 164.

(6) 2 Stra. 1250. 4 Campb. 54.

(7) Abbott, 243. Park, 444. notes.

(8) See Abbott, 249. 4 Campb. 112. As to the power of the owners or master over the cargo for the necessary repairs of the ship, see ante.

of a vessel covenanted with the freighter, that the vessel should proceed from England to Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make bills of lading, it was held, that the freighter having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods, signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon. (1)

During the voyage the master must take great, and, as it is said, more than ordinary care of the cargo; if it be required to be aired or ventilated, as fruit and some other things do, he must take the usual and proper methods for this purpose. (2)

By an exception in the charterparty, not to be liable from injuries arising from the act of God, and the king's enemies, the owner or master is not responsible for any injuries arising from the sea or winds (3), unless indeed it be in his power to prevent it, or was occasioned by his imprudence or gross neglect (4); as if the goods be stolen or embezzled on board the ship by the crew or other persons, or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners (5). We have, in a slight degree, considered as to what will amount to a loss by the act of God, the king's enemies, &c (6); but we shall under the head of insurance give it a further consideration. (7)

Exceptions limiting owner's, &c. liability.

When the ship has arrived at the place of her destination, the owner or master must take care that she be safely moored or anchored (8), and without any delay deliver the cargo to the merchant or his consignees, upon production of the bills of lading, and payment of freight and other charges due in respect of the carriage; and if by the terms of the charterparty a particular number of days is stipulated for the delivery, either generally or by

Duties of owner, master, &c. on completion of voyage.

(1) 12 East. 381.

(2) Abbott, 255.

(3) 1 Dow. 336. Park on Insurance, 333.

(4) 1 Wils. 281. 12 East, 381. ante. 2 Holt on Shipping, 97.

3 Esp. 127.

(5) Abbott, 4 ed. 255.

(6) Ante, 372.

(7) See post, tit. Insurance.

(8) Ord. of Wistbury, art. 36. Abbott on Sh. 4 ed. 257.

way of demurrage, he must wait the appointed time for that purpose. These charges are, in ordinary cases, *primage* and the usual petty average as expressed in the bill of lading; in case of any loss that became the subject of general average, the civil law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners of the cargo saved the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose (1). It is, however, most usual in practice in this country, in the case of a general ship, for the master to take security from the merchants before he delivers the goods for payment of their shares of this contribution when the average shall be adjusted (2). The cargo is bound to the ship as well as the ship to the cargo, and therefore unless there is a stipulation to the contrary, the master is not bound absolutely to part with the possession of any part of his cargo, until the freight and other charges due in respect of the carriage of the goods are paid. (3)

The manner and liability of owner and master, &c. in delivering goods.

The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend (in the absence of an express stipulation to that effect), upon the custom and usage of particular places and trades (4). Thus a hoyman who brings goods from an out-port into the port of London is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment (5); and if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at London, the master must obey the request, for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it (6). In the case of ships coming from a foreign country, delivery at a wharf in London discharges the master (7). If the consignee send a lighter to fetch the goods, it seems the master of the ship is obliged, by the custom of the river Thames, to watch them in the lighter till it be fully laden; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter,

(1) Dig. 142. 2 Abbot, 257. &c. more fully hereafter.

(2) Abbott, 258.

(4) Abbott, 260.

(3) Abbott, 258. We shall consider the owners and masters lie upon the cargo for freight,

(5) 2 Esp. N. P. C. 603.

(6) 4 T. R. 260.

(7) Per Buller J. 5 T. R. 397.

unless indeed the consignee consent to release him from the performance of it (1). But it has been much contested whether the master is by the usage bound to take care of the lighter after it is fully laden, until the time when it can be properly removed from the ship to the wharf, though it should seem he was not bound to do so (2). When ships arrive from Turkey, and are obliged to perform quarantine before their entry into the port of London, it is usual for the consignee to send down persons, at his own expence, to pack and take care of the goods; and the damage arising from his neglect to do so will not fall upon the owners. (3)

When the terms of the charterparty have been fulfilled by the owners or master, or if it be otherwise discharged, it should be delivered up and cancelled.

Such is the construction and legal effect of the owners or masters covenants. The same rules of construction are applicable throughout the whole charterparty, and consequently to the covenants of the charterer or consignee of the cargo. If the charterer be not prepared to ship the goods on the appointed day, and the owner or master have derived no benefit from the charterparty, he may rescind it altogether, and take on board other goods and recover damages (4). And so if the charterer has shipped part of the goods on board, but is not ready to ship the remainder, the master will not, unless he contracts so to do, be bound to wait for the remainder, but he may take other goods on board and proceed on the voyage, and recover damages against the charterer in the nature of dead freight. A freighter omitting to supply a cargo is liable for the freight of an average cargo of the article, with some of which he engaged to fill the ship (5). The dead freight is to be calculated according to the actual capacity of the vessel, and the owner is not bound by the number of tons burthen mentioned on the charterparty, unless the misrepresentations were fraudulent (6). The charterer of a ship may lade it either with his own goods, or if he has not sufficient, may take in the goods of other persons, or he

Of the hirer or charterer's covenants and liabilities.

(1) Peake N. P. C. 150. Ab- 1789. Abbott, 261. Ante, 2 vol. 83. bott, 261. (4) Jure Mar. 1, 2. cap. 4.

(2) Robinson v. Turpin, T. T. sect. 3. 1 Beawes, 188. 1805. Abbott, 261. (5) 2 Stark. 450.

(3) Drumage v. Jolliffe, M. T. (6) Id. ibid.

may wholly underlet the ship to another. Therefore, if it be requisite to prevent this, a clause in the charterparty should be inserted to that effect (1). Where the covenant was to lade a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held that the freighter had the option of filling the ship with any kind of goods, omitting copper, although the ship was thereby obliged to take in ballast (2). He must not lade any prohibited or uncustomed goods in the ship, by which the ship may be subjected to detention or forfeiture. The charterer is bound to procure every thing within the meaning of his covenants. In an action against the charterer for not having procured a sufficient licence, though by the charterparty the charterer had, through a misconception, covenanted to procure it, yet it appearing that no licence was necessary, the charterer was not bound to procure one (3). Where the merchant had conditioned with the owner that an extra number of men should be taken at his expence to work the ship, but that he the merchant should not be called upon to pay them until the ship's discharge or return from her voyage, the ship being accidentally burnt in the West Indies, the court held the merchant still liable (4). The merchant must, within a reasonable time, depending on circumstances and the practice at the port of delivery (5), or if a time be specified within that time (6), unlade the cargo at the port of destination, pursuant to the terms agreed upon; and if he do not, he will be liable to demurrage, if agreed for, and if there be no stipulation he will be liable to an action for the improper detention of the ship. Where a ship was to freight by charterparty from the plaintiff to the defendant, and the deed contained a clause whereby it was covenanted and agreed by and between the said parties "that 40 days shall be allowed for unloading and loading again," &c. it was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days, and that if the freighter detained her for any longer time he would be liable in the covenant. (7)

(1) Abbott on Shipping, 188.

(2) 4 Campb. 103.

(3) 2 Taunt. 344.

(4) 10 East, 555. See also
2 East, 381.

(5) 2 Campb. 483. 488.

(6) 2 Campb. 353. Holt, C.N.P.
35.

(7) 12 East, 179.

When a merchant does not hire the whole, but only a part of a ship for the conveyance of goods, and in pursuance of such hiring he puts sundry goods on board the ship, the owner or master, or other person acting for him, usually gives a written document or receipt for them, termed a bill of lading, whereby he acknowledges the delivery of the goods on board (2), and contracts to carry them on the voyage (3), and to deliver them to the merchant or consignee in good order, (the dangers of the sea, &c. excepted) (4); the merchant or consignee, or his assigns, paying freight, &c. for the carriage (5). This document is

H. Bills of
Lading. (1)

(1) See, in general, Abbott on Shipping, 4 ed. 225. 2 Holt on Shipping, 55. Beawes, Lex Merc. 196, 7. Montefiore's Precedents, 111. Montefiore's Commercial Dictionary, tit. Bills of Lading, and Postlethwaite's Dict., same title.

(2) If there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly, see Abbott on Shipping, 4 ed. 226, 227. If the bill of lading specifies that the contents are unknown, the bill is not evidence, either of property in the consignee, or of what goods were shipped. 3 Taunt. 303. And the 26 Geo. 3. c. 86. sec. 3. enacts, that owners of ships shall not be liable for loss of precious stones, &c., by reason of robbery, &c., unless the shipper thereof insert in his bill of lading, or otherwise declare in writing to the master, &c. the true nature and quality of such articles, ante, 376.

(3) Where the freighter has appointed the destination of the vessel, and the master has taken in goods, and signed bills of lading accordingly, he cannot change the destination without first recalling the bills, or at least tendering an indemnity against them, 12 East, 381.

(4) The terms of this exception are usually in the following words: "The act of God, the king's enemies, fire, and all and every other

dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted."

But in the case of ships homeward bound from the West India Islands, which send their boats to fetch the cargo from the shore, there is introduced a saving out of this exception, "of risk of boats so far as ships are liable thereto." And in that case, the whole clause is as follows: "The act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto excepted."

Under this exception it has been held, that where goods were dispatched from the ship in her boat, according to the usual course of trade in the West Indies, were, together with the boat, lost in a hurricane, that the owners were not responsible, 1 Brod. & B. 454.; but the court there considered this latter form of exception very badly drawn up. Other exceptions are and may be introduced to take away the responsibility of the master and owners in various cases, for which they would otherwise be responsible. As to the meaning and construction of this exception in general, see post, tit. Insurance.

(5) Sometimes a third person is mentioned as the consignee in the bill of lading, sometimes the shipper or consignor is himself named as consignee; and then the en-

usually tendered by the shipper of the goods, for the master to sign.

There should be always three parts of a bill of lading made out: one should be remitted per post, after signature, to the consignee (1); the second, containing the stamp, should remain with the shipper, and the third should be given to the master, that he may ascertain the specific merchandize which he has on board (2); and a clause should be inserted in each, that upon the fulfilment of the terms of one the rest shall be void. The effect of each bill of lading in a set is equal, so that the one signed first by the owners or master, &c. has no greater force than the one signed second; but if the different parts should be indorsed to different persons, the first *bonâ fide* indorsee will be entitled to the property (3); and where there are several bills of lading in a set, which, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery under any one of them will discharge him from all (4). Upon a bill of lading of or for any goods to be exported or carried coastwise, a duty of 3s. seems to be imposed (5). Before this act, which extended the duty to goods carried coastwise, it was held, that goods carried from a port in Scotland to a port in England were not to be considered as exported, so as to make it necessary to have the bill of lading stamped under the 48 Geo. 3. c. 149 (6). It is very frequent, upon the delivery of goods on board a general ship, for the master or other person acting for him in his absence, merely to give a common receipt for them, which is to be delivered up on the master's signing bills of lading; but these bills of lading should be signed by the owner or master within twenty-four hours after the delivery of

gement is expressly to deliver to him or his assigns. And sometimes no person is named as consignee; but the terms of the instrument are, "To be delivered, &c., unto order, or assigns," which words are generally understood to import an engagement, on the part of the master, to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person; but if the person to whom the delivery may be so ordered is only an agent for the shipper, and has

no property in the goods, he cannot maintain an action in his own name against the master for not delivering them.

(1) In general it is the duty of a shipper of goods to send a letter of advice of the shipping to the consignee, but this depends on the course of dealing between the parties, 5 T. R. 218.n.

(2) Supra, last note but one.

(3) 1 T. R. 205.

(4) Id. ibid.

(5) 55 Geo. 3. c. 184. Schedule, part.

(6) See 1 Marsh, 204.

the goods, and when this receipt is given the master should not deliver the bills of lading but to the party who can give the receipt in exchange. (1)

The principal difference between a bill of lading and a charterparty is, that the first is usually given as a contract for the conveyance of a single article laden on board a ship that has sundry merchandizes shipped for different persons, usually termed a general ship; whereas a charterparty is, in general, a contract for the use of the whole ship (2). A bill of lading is seldom given where there is a charterparty, especially when the charterparty is under seal; when it is given together with a charterparty, it is to be considered merely as evidence of the shipment of the goods.

When a ship is intended to be employed in the conveyance of merchandize, it is usual to give notice of the owner's intention by printed papers and cards, mentioning the name and destination of the ship, her burthen, sometimes her force, and sometimes expressing also that the ship is to sail with convoy, or with the first convoy for the voyage, or other matters relating thereto. Such statement is in general an assurance or warranty to the merchant, who lades goods on board the ship in pursuance of the advertisement, and becomes a part of the contract with, although it be not afterwards contained in, the bill of lading or charterparty not under seal. (3)

Bills of lading are transferrable and negotiable by the custom of merchants, so as to vest in the assignee the property in the goods. Sometimes they are so from the nature of their contents, as where there is a stipulation to deliver the cargo "to A. B., or to his assigns." (4) The manner of transferring them is by indorsement and delivery of them by the shipper or his assignee to a third person, and so on from one person to another, and this method will be always *prima facie* evidence of an immediate transfer of the legal interest in the cargo shipped under them (5). Sometimes the bill of lading is made

Transfer of Bills
of Lading.

(1) Holt, C. N. P. 100. 2 Marsh, 127. 6 Taunt. 433. S. C. 63. 1 Lord Raym: 271. 12 Mod.

(2) Montefiore's Precedents, 156. 3 Salk. 290. 3 Burr. 1523. 197. Postlethwaite's Dict. tit. Bill of Lading. 1669.

(3) Abbott, 4 ed. 224. 2 Holt 6 East, 21, 22. on Shipping, 57. 4 Camp. 243.

(4) 5 Term Rep. 683. 2 T. R. 215, 216.

for delivery to the consignor by name, or assigns, sometimes to order or assigns, and at other times to a consignee (naming him) or his assigns. In the first two cases the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person, or indorses it specially for delivery to a person named by the indorsement; it scarcely ever makes any difference whether it be general or special, though if it be general, the property in the goods under the bill of lading does not in general pass till delivery (1). Sometimes the legal interest in the goods under a bill of lading is transferred to a third person, subject to some condition, and when this is so, such condition is usually expressed in the indorsement.

The property in goods shipped under a bill of lading may be transferred by delivery to a third person, without any indorsement of the bill of lading; and such transfer will be good against all the world except an indorsee of the bill of lading for a valuable consideration; for where the property in goods is *absolutely* vested in a *boná fide* holder, nothing will divest it (2). And the property of goods under a bill of lading may be vested in another, even without delivery or indorsement of the bill of lading, as by an agreement between the owners of the goods and third persons, either in the characters of creditors or purchasers, accompanied by acts vesting the property in the goods in such persons (3); but under such agreement the assignee of the goods will not in all cases acquire such an indefeasible property therein as to deprive the assignor or consignor of his right to stop them *in transitu* if he knew of this (4). An agreement to assign, made by a consignee on receiving a letter of advice of a shipment on his account, is an assignment, or at least an equitable lien effectual against assignees (5). If a cargo be delivered to a shipowner, like goods to a carrier, to be conveyed on account, and at the risk of the consignee, the property of such goods is immediately vested in the consignee by the shipment itself, and the delivery is complete for all purposes, except against

(1) *Mendham v. Stanford*, MSS. and see ante, 350, 1.
 15 Jun. 1816. (4) 3 East, 585. but see ante,
 (2) 5 Taunt. 558. id. 79. 759. 350, 1.
 1 Marsh. 233. 4 East, 211. (5) 2 T. R. 485. 4 Camp. 267.
 (3) 1 Bos. & P. 563. 3 East, and see ante, 350, 1.
 585. 4 Camp. 31. 4 East, 211.

stoppage *in transitu*, by the unpaid consignor, upon any breach of the conditions by the consignee before the actual arrival. (1)

In all cases, however, it is most advisable to obtain an indorsement and delivery over of the bill of lading, otherwise much trouble and difficulty will be incurred, and the captain of the ship will seldom deliver the goods over without an indemnity; besides which, it is to be considered as a general rule that such indorsement and delivery is always *prima facie* evidence of an immediate transfer of the legal interest in the cargo. (2)

Any person *bonâ fide* claiming goods under an indorsement of a bill of lading, by the shipper or his consignee or assigns, when they had full power to indorse it, has a right to the goods if he can prove he has given a good consideration for them (3). The *bonâ fide* indorsee of a bill of lading, which has been indorsed to him as a security for debts due to him from the consignee, has a right to the possession of the goods against the consignor, though he knew at the time of the indorsement that the goods were not paid for by the consignee (4). But when the bill of lading is indorsed upon a condition, and such condition is or may be known to the holder of the bill of lading, he cannot legally entitle himself to possession of the goods under such indorsement, till the condition has been fulfilled (5). If the different bills of lading in a set are indorsed to different persons, the title of the first indorsee in order must prevail (6). But no property in the goods under a bill of lading can absolutely pass to a third person, where he has given no consideration for the indorsement to him (7), or the indorser had no power to indorse it. Thus a factor cannot pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves; and no property will pass to a third person under such indorsement and delivery, though he acted *bonâ fide*, and did not know the indorser was a factor (8): but it has been held, that if the consignee, though a

(1) 3 East, 590.

(5) 3 Camp. 92.

(2) 1 T. R. 215, 216.

(6) 1 T. R. 205.

(3) Montefiore's Prec. 111. 2

(7) 1 Camp. 369. 4 East, 211.

Holt on Ship. 59. 4 Campb. 31.

(8) 6 East, 17. 7 East, 5. 5 T. R.

4 Burr. 2051. 1 Blac. 628.

604. Stra. 1178. 1 Maule & S. 140.

(4) 9 East, 506. 1 Camp. 104. 4 Taunt. 24.

mere factor, make an absolute sale of the goods whilst at sea, and where no other delivery can be given than by the indorsement of the bill of lading, such sale will be good, and the *bona fide* vendee of goods is entitled to hold the goods by virtue of the bill of lading, though no actual possession be delivered, and though the factor may afterwards have embezzled the amount, or may have acted fraudulently, or in contravention of some covenants by himself with the consignor (1). We have before considered the effect of the indorsement and delivery of a bill of lading on, and the law relative to the rights of the consignor to stop goods *in transitu*. (2)

The same rules of construction which are put upon the subject matters of charterparties will assist in the construction of bills of lading (3); and the duties and rights of the master or owners under a bill of lading are for the most part the same as those under a charterparty. The master of a store ship in the king's service, taking in bullion of a private merchant on freight from Gibraltar to Woolwich, is liable for the loss of bullion (4). It may be as well here to observe, that when there are adverse claims of the goods under a bill of lading, the captain should file a bill of interpleader (5); and he may file such bill though the adverse claims are paramount to the bill of lading, as the right of possession in chattels may be in one person, and the right of property in another (6); or he may deliver them over to either party he thinks most legally entitled to them, upon his obtaining an indemnity from the consequences of such delivery. Indeed a merchant is bound always to indemnify the master from the consequences of any bill of lading signed by him (7), and the owner or master who has signed bills of lading cannot, with prudence, deliver back the goods without having all the parts of the bill of lading delivered up to him, for if any one part has been transmitted to a third person, such third person may have acquired a right in the goods.

(1) See 2 Holt on Ship. 60. 4 charterparties, see ante 390, &c.
Camp. 267. Sed vid. 2 T. R. 63. (4) 6 Taunt. 577.

5 T. R. 683. 9 East, 506. 3 T. (5) 3 Maddox, 277.

R. 467. (6) 3 Mad. 564. in note; in

(2) See ante, 352., &c.

index, tit. Interpleading Bill.

(3) As to the construction of

(7) 2 Eq. Ca. Ab. p. 98.

Freight is the sum to be paid by a merchant or other person for the hire and use either of the whole or a part of a ship, in the carriage of goods from one place to another (2). Sometimes, as we have seen, freight is agreed to be paid by a charterparty, at other times by a bill of lading, but in the absence of either of these formal contracts, it would be claimable according to the custom or usage of the trade, or on a quantum meruit. It may be as well here to observe, that where freight is stipulated to be paid by a charterparty, or bill of lading, or other contract, such stipulation cannot be varied in its terms by any new or additional facts or evidence; and therefore where (3) by a charterparty the defendant covenanted to pay freight for a cargo at a certain rate per ton, freight measurement, to an action for non-payment of freight he pleaded first, that by the use of the particular trade, an account must be produced to the freighter by the owner before he could demand payment of the freight, and that no such account was delivered; and secondly, that it was the duty of the plaintiff to deliver a freight measurement, and that he had not done so: it was held on demurrer that these pleas were bad, as the usage so pleaded would create a new condition, and vary the terms of the original contract. The *amount* of the freight is usually settled in express terms in these instruments, sometimes it is settled by the usage of trade (4). The freight for goods shipped from abroad and consigned to a merchant in this country, are to be paid for according to their net weight, as ascertained at the king's landing scales, and not according to the weights expressed in the bill of lading, unless there be a special contract so to pay for them (5). Where the bill of lading, of a cargo shipped at Dantzic, on board a Prussian ship, expressed it to be 100 *last* in 2,092 bags, and the consignee had purchased it for that quantity English measure, but it did not amount to that quantity by the Dantzic measure, which is larger; it was held that the master was entitled to freight according to the measure in the bill of lading, and exceeding the Dantzic measure (6). In the case of a charterparty, if the stipulated payment be a *gross* sum for an entire ship or an entire

III. Of freight, definition, &c. (1).

Of the contracts for, in general.

(1) See Abbott on Ship. 4 ed. 284. 2 Holt on Ship. 133.

(2) See 2 Bos. & Pul. 321. 5 Taunt, 435. 1 Marsh. 123. 4 M. & S. 37. 1 Camp. 84, as to what may be termed freight.

(3) 8 Taunt, 251.

(4) The 59 G. 3. c. 25. regulates the rate, &c. of freight for gold, &c., on board his majesty's ships.

(5) Holt C. N. P. 346.

(6) 4 Taunt, 102.

part of a ship for the whole voyage, the gross sum will be payable, though the merchant have not fully laden the ship (1); and if a certain sum be stipulated for every ton, or other portion of the ship's capacity for the whole voyage, the payment must be according to the number of tons, &c. which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant (2); on the other hand, if the merchant has stipulated to pay a certain sum per cask or bale of goods, the payment must be, in the first place, according to the number of the casks or bales shipped and delivered; and if he has further covenanted to furnish a complete lading, or a specific number of casks or bales, and failed to do so, he must make good the loss which the owners have sustained by his failure, to be settled in case of disagreement by a jury, who will take all the circumstances into consideration. (3)

The burthen of the ship is usually mentioned in the contract for freight, sometimes with the addition of the words "or thereabouts," and the quantity of the burthen mentioned should not exceed the exact measure above five tons. If an entire ship be hired, and the burthen thereof expressed in the charterparty, and the merchant covenant to pay a certain sum for every ton of goods which he shall lade on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped (4); but if a freighter agree to load a full and complete cargo, though the burthen of the ship is described to be of a less quantity than it really is, yet the freighter must load a full cargo, according to the real burthen of the ship, and he will be liable for freight according to what ought to have been loaded, unless indeed the owner or master make a false description of the burthen with a fraudulent intent. (5)

With respect to the *manner and time* of payment of freight, it is most frequently contracted to be paid, either by the whole voyage, or by the month, or other time; in the former case it is either fixed at a certain sum for the whole cargo, or so much

(1) Abbott, 286.

(2) Id. 287.

(3) Id.

(4) Abbott, 287. *Lady James*

v. E. I. Company, M. T. 1789, and Abbott, 188.

(5) See 2 Barn. & Ald. 421, and see 3 Taunt. 469.

per ton, barrel, bulk, or other weight or measure, or so much *per cent.* on the value of the cargo (1). When freight is contracted to be paid for the whole voyage, the owners in general take upon themselves the chance of the long or short duration of the voyage; but if it is contracted to be paid for the month (2) or other time, then the risk of the duration of the voyage falls upon the merchant (3); and if no time be fixed for the commencement of the computation, it will begin from the time the ship breaks ground in the course of her voyage (4), and will continue during the whole course of the voyage, and during all unavoidable delays not occasioned by the act or neglect of the owners or master, or by such circumstances as work a suspension of the contract for a particular period (5). Thus the freight will be payable for the time consumed in necessary repairs during the voyage, if it do not appear that the ship was insufficient at the outset, or that there was any improper delay in repairing her (6). When freight is reserved monthly, to be paid in proportion at the end of two, six, ten, and fourteen months, it is earned at the end of each month, and the time of payment is only postponed (7). Freight is sometimes stipulated to be paid in advance, but perhaps this may not be strictly called freight; an agreement that in consideration that A. would take on board his ship B.'s goods for the purpose of conveyance, B. would pay a certain sum on A.'s delivering to him the bills of lading, is a valid contract, and the price of the carriage of the goods is recoverable immediately on the loading of them, and whether the voyage be performed or not. (8)

We will now divide our enquiries on this important subject into the following branches. First, when the entire freight is earned. Secondly, when only part of the freight is earned. Thirdly, who are entitled to freight, and the rights, &c. of such parties. And lastly, who are liable to the payment of freight.

(1) See Montefiore's Dictionary, tit. Freight, Postlethwaite's Dic. tit. Freight. To freight a ship, and to take certain tonnage to freight, are different things, as also to be a cap merchant, or under-freighter. Postl. Dic. id.

(2) This is in general to be considered as a *calendar* not a *lunar* month. 1 Esp. Rep. 186.

(3) Abbott, 4 ed. 288.

(4) 2 Hen. Bla. 634.

(5) 3 Bos. & Pul. 405. Abbott. 288.

(6) 10 East, 555., and see 2 Campb. 627. 3 Bos. & Pul. 405.

(7) 10 East, 555.

(8) 1 Marsh, 122. 5 Taunt. 435. See 1 Campb. 84. 2 Shaw, 283. 2 Bos. & Pul. 231. 4 Camp. 241.

When the entire freight is earned.

It may be laid down as a general rule that in the absence of an express contract to the contrary, the entire freight is not earned until the whole cargo is ready for delivery, or has been delivered to the consignee, according to the contract for the conveyance of it (1). If freight is to be paid for the carriage of live stock at so much per head, freight is not payable for such as die during the voyage (2). But if the owner or consignee of the goods neglect to perform his part of the contract, or so act as to prevent the owner or master of the ship from completing the conveyance and delivery of the goods, the latter will, in the shape of damages, be entitled to the whole freight; and where the merchant covenants to furnish a complete lading, or a specific number of casks or bales, and fails to do so, he will be liable for the whole freight (3). A freighter who has the option to load wholly with cotton at a higher rate, or partly with rice at a lower rate, and partly with cotton, after an election to load with cotton, and failing to furnish a complete cargo, is bound to pay the higher freight for the whole ship (4); but if the merchant do not covenant to furnish a complete lading, although the charterparty or contract express the vessel to be hired by the ton, and that the freighter should pay so much per ton for every ton of goods which he should lade on board, then the owners can only demand payment for the quantity of goods actually shipped (5). Where a ship is chartered outwards only, without reference to her return, and a delivery of the cargo is prevented by the perils of the seas, freight it seems is due to the owner for bringing it back (6); and where a ship hired to go beyond seas to fetch home a cargo, for which a certain rate *per ton* was to be paid, nothing being payable for the outward voyage, was forced to return in ballast, the merchant's factor having no goods to put on board, the Court of Chancery decreed payment of the freight (7). If, upon an agreement between the owners and freighter, that the ship shall sail to a particular place abroad, and there receive and load a full and complete cargo of goods, the ship sails and arrives, and is ready to receive her cargo, but the freighter is prevented from loading her in consequence of a

(1) See 2 Barn. & Ald. 17.

21. S. C.

(2) Molloy, book 2. ch. 4. s. 8. Abbott, 285. 4 ed.

(5) James v. E. I. Company, sittings post M. T. 1789. 2 Holt on Shipping, 138.

(3) 11 East, 232., and see 2 Vern. 212.

(6) 1 Taunt. 300.

(4) 7 Taunt. 272. 1 Moore,

(7) 2 Vern. 212. Abbott, 287.

prohibition to export goods, the owner, notwithstanding such prohibition, is entitled to the full amount of the freight (1). Where a plaintiff, by charterparty dated 1st March 1775, let to defendant a ship to freight, and by the terms of the charterparty the plaintiff was to carry an outward cargo of goods (not prohibited by restraint of princes), from Liverpool to South Carolina in America, and to bring back from thence a cargo of rice for defendant, defendant paying freight for the same, and the plaintiff cleared out the ship on the 22d March following, and set sail on the 30th from Liverpool with a cargo of salt to and arrived at Carolina, where in consequence of a prohibition issued by the states of America the 1st of March, the very day the charterparty was dated, against the importation of all British goods, and also in consequence of a further order issued before the ship's arrival, prohibiting the exportation of goods to England, the plaintiff could not unlade his cargo, or take in a return cargo, and sailed back again to Liverpool, the freighters were held liable for freight homewards; but in that case it was questioned whether the defendants would be liable, if the plaintiff knew of the prohibition before the clearance of the vessel at Liverpool (2). In cases where the freighter neglects to complete a full cargo, &c. according to his agreement, but the master or owner of the vessel nevertheless earns freight by the carriage of other persons goods in the room of those which ought to have been laden, the freighter will only be liable for the whole freight, and for damages *minus* the freight so earned by the carriage of other persons goods (3); but where a ship was let to freight for a voyage to take out a small cargo of lead to P., and to bring home a return cargo, for which freight was to be paid at eleven guineas per ton for the whole ship's admeasurement; but if, from political circumstances, she was unable to discharge her cargo, and consequently to obtain a return cargo, and the freighters agreed to pay a gross sum less than the amount of the freight per ton, the ship being prevented from discharging, and the freighter supplying no homeward freight, the master took in other goods in freight, and brought them home together with the lead, the Court of Common Pleas held, that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. (4)

(1) 3 Bos. & Pul. 295. n. A.

(3) See 11 East, 232.

(2) *Heslop v. Jones*, 2 Chitty's Rep. 550.

(4) 2 Taunt. 285. 12 East, 496. n. S. C.

If the freighter or his consignee dispense with the performance of the voyage, and accept the cargo at any other place, or in any other manner rescind the contract of affreightment, and the owners are ready and willing to complete their engagement, the whole freight will be recoverable (1). If the consignee accept the goods, he cannot defend himself from the payment of the whole freight, on the ground that they were damaged on the voyage, but he must bring his cross action. (2)

An interruption of the regular course of the voyage happening by the perils of the seas, or without the fault of the owner, does not deprive him of the entire freight, if the ship arrive with and be ready to deliver the whole cargo at the place of destination, as in the case of a capture and recapture (3), or of an embargo (4); and when the ship, by reason of any disaster or otherwise, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage, the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight (5). But the Court of Admiralty have refused to give freight when the vessel, being captured on the outward voyage, was recaptured and brought back to the port of her departure (6); and freight was refused to a ship under embargo, against a cargo not under the embargo, but which was obliged to be unloaded to be sent in another vessel (7). Although no freight is due where by the sale of the goods the voyage has been totally defeated (8), yet where the master by most imperious necessity was compelled to sell a part of the cargo, and there was a total absence of all fraud, but the expences were incurred by the default of the owners of the cargo, full freight was allowed on the entire cargo. (9)

The owner is entitled to freight on goods delivered to and received by the merchant at the place of destination, though they happen to be greatly damaged by a peril of the sea, or be so damaged as to be of no value, and the owner in such case is not answerable for the expence incurred in endeavouring to

(1) 1 Taunt. 301. 7 T. R. 381.

(2) 6 Taunt. 65. 12 East. 381.

(3) 3 Rob. Rep. 101. 3 Bos. & Pul. 420. 431. See 2 Campb. 627.

6 Rob. 231.

(4) 1 Bos. & Pul. 537.

(5) Abbott, 311.

(6) 3 Rob. Rep. 180.

(7) 4 Rob. 17. 77.

(8) Dod. 317.

(9) Dod. 385.

remove the injury occasioned by such peril of the sea (1); and in an action for freight, damage done to the goods by bad stowage cannot be given in evidence, either as a complete defence, or in mitigation of damages, even though the damage exceed the amount of the freight (2). It appears doubtful whether the merchant in these cases is bound to receive the goods, or whether he is not at liberty to abandon them when brought to the place of destination, and by so doing to discharge himself from the freight. It is observed, that upon this question different doctrines and opinions have prevailed, and there is no judicial decision in our books, although in some cases between the merchant and his insurer, it has been admitted that the freight was payable, notwithstanding the goods were so much damaged, that their value fell short of its amount (3): but it is necessary to distinguish the causes from which the deterioration may have proceeded; if it had proceeded from the fault of the master or mariners, the merchant is entitled to receive a compensation, and of course he is not answerable for the freight, unless he accept the goods, except by way of deduction from the amount of the compensation (4); on the other hand, if it have proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of a ship, the merchant must bear the loss, and pay the freight, for the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event (5). In our West India trade, the freight of sugar and molasses is said to be regulated by the weight of the casks at the port of delivery here, which, in fact, is in every instance less than the weight at the time of the shipment, and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship by the nature of the contract.

It frequently happens that the master or owner fails to complete his contract, either by not delivering the whole of the

Where only part of the freight is earned.

(1) 6 Taunt. 65. Dougl. 272. 300.
Lutwidge v. Grey, House of Lords,
23d Feb. 1733.

(2) 4 Campb. 119. See also
7 East, 479. 1 Campb. 38. 377.
1 Stark. 108.

(3) 2 Stra. 1065. Park. on Ins.
160. Marsh on Ins. 143. Abbott,

(4) See 7 East, 479. Abbott,
301.

(5) See as to this point, Abbott,
300 to 304., and the several author-
ities there quoted. See also 2 Burr.
882. 1 Bla. Rep. 190.

goods to the consignee or owner, or by delivering them at a place short of their original destination; in these cases, if the owner or consignee of the goods derive any benefit from the conveyance, he is liable to the payment of freight *pro rata itineris*, or for so much as the partial carriage of the goods was worth; and though contracts of this nature are frequently entire and indivisible, and the master or owner of the ship cannot, from the nature of them, sue thereon, and recover even freight *pro rata itineris*, yet he may do so upon a fresh implied contract, for as much as he deserves to have (1), unless indeed there be an express clause in the original contract to the contrary, that he shall not have freight *pro rata itineris*. A fresh implied contract arises upon the owners or consignees acceptance of the goods. Considerable difficulties have arisen in determining what shall amount to this acceptance (2), but as these difficulties all occurred on the particular facts of each case, it would be impracticable here to consider them minutely; no actual acceptance by corporal touch is necessary, and the acceptance may be made by the express or implied directions, and with the consent of the owner or consignee of the goods, but not otherwise. •

This indeed may be considered as the summary of the law, which entitles a party to freight *pro rata itineris*: there are indeed various decisions and cases on the subject, but they all appear to bear towards the same point, viz. that if a party derives any benefit from the conveyance of the goods, he must pay freight in proportion to the benefit of the carriage. If a ship be wrongfully seized and sold, and restitution in value be awarded against the captors, the owners will be entitled to freight *pro rata itineris* of the voyage performed at the time of capture (3): if the ship and cargo sink or be taken, the freight is sunk or taken with it; but if the ship be retaken, the freight, as before said, revives in the recapture. No freight will be due where the voyage is prevented upon its immediate commencement without the act of the freighter, as where a vessel was chartered to take

(1) See 2 Atk. 621. Malyne Lex Mer. 100. 1 Taunt. 300. See also 2 Holt on Shipping, 141. 12 East, 179. 7 T. R. 381. 8 East, 437. 4 Taunt. 748. 1 Maule & S. 573. 5 Taunt. 612.

(2) See 10 East, 378. 526. 2 Campb. 466. 1 Edw. Ad. Rep. 246. 1 Rob. 289. 3 Rob. 101. 180. 4 Rob. 17. 77.

(3) Park on Ins. chap. 2. page 70. 1 Rob. Rep. 289.

a cargo to Venice, but immediately upon leaving port, was obliged to return by bad weather, and was stopped by an embargo, in consequence of which the cargo was landed and redelivered to the freighter. (1)

If a party admit *pro rata* freight to be due, and by agreement stipulate to pay it, he cannot dispute the payment of it (2). Where P. was the owner of a ship which took in a cargo at Calcutta, to be carried thence to St. Petersburg, where P. resided, this cargo was purchased on account of P. by E. his supercargo and agent, but the house of E. F. & Co of Calcutta advanced £26,000 towards the purchase thereof, and of the cargo of another ship belonging to P., and for their security bills of lading of the first mentioned cargo were signed by the captain as shipped by F. F. & Co., on account of P., to be delivered at St. Petersburg to the order of F. F. & Co. or their assigns; the words "he or they paying freight," which in the bills of lading immediately followed the direction for delivering to the order of F. F. & Co., were struck out; these bills were delivered to F. F. & Co., and indorsed and transmitted by them to the defendants their correspondents in London. Before the ship sailed from Calcutta, a memorandum of charter was entered into between E. and the captain, whereby it was agreed that the ship should be dispatched with a complete cargo, should proceed to St. Petersburg, and there deliver the same to the order of the freighter, on payment of freight at a specified rate. The ship in the course of her voyage was lost, but there was a salvage of part of the cargo, which was sold with the assent of the captain, and produced the net sum of £13,300. In April 1816 the defendants, as holders of the bills of lading, applied for the proceeds of the salvage, but the plaintiffs had put a stop thereon, on the part of P., and the captain as agent of P. claimed a lien thereupon for *pro rata* freight. On the 12th July 1816, the memorandum for charter not being then forthcoming, and the defendants being then in possession of the bills of lading, by letter to the plaintiffs agreed that (in consideration of the plaintiffs handing to the defendants the captain's order in the defendants favour for the proceeds of the cargo of his late ship, and a letter from the plaintiffs to those who had

(1) 4 Rob. Rep. 77., and see (2) 3 Taunt. 354.
10 East, 521.

sold the cargo, withdrawing any claim on account of P.), the defendants would hold themselves accountable for the plaintiffs as the agents of P., for whatever might appear to be due for the *pro rata* freight, according to the charterparty entered into at Calcutta between E. and the captain; the plaintiffs performed their part of the agreement, and the defendants in consequence received the proceeds of the salvage, but refused to pay the *pro rata* freight. It was held that the plaintiffs were entitled to recover in *assumpsit*, on the agreement of July 1816, the amount of the *pro rata* freight.

Who are entitled to freight.

The owner or master of the vessel, or other party with whom the contract of affreightment is made, is always the party *prima facie* entitled to claim the payment of freight. A flag officer commanding on a foreign station is not entitled to any share of the freight paid by private merchants to the captain of a ship of war, for the conveyance of private treasure on board the said ship to this country, in pursuance of orders issued to the captain by the flag officer, under the authority of the admiralty. (1)

It frequently happens that the owner of the ship, who is originally entitled to the freight, sells or otherwise disposes of his interest in the ship; where a chartered ship is sold *before* the voyage, the vendee, and not the vendor or party to whom he afterwards assigns the charterparty, is entitled to the freight (2). But where the ship has been sold *during* the voyage, the owner, with whom a covenant to pay freight has been made, is entitled to the freight, and not the vendee (3). A mortgagee, who does not take possession, is not entitled to the freight (4). We shall hereafter consider the right of an underwriter to freight after the abandonment of a vessel (5). It is a general rule, in the case of a capture, that the captor succeeds to all the rights of the owner of the captured vessel, and the crown succeeds to all the rights of the captor, though under circumstances this right will not succeed. Freight is given to the crown, as succeeding to the rights of the enemies shipowners, though not decreed prior to the breaking out of hostilities (6). If the owner is not entitled

(1) 5 Maule & S. 32.

(2) 2 Taunt. 407.

(3) 10 East, 279. 1 Hen. Bla. 117. in notes.

(4) 1 Hen. Bla. 117.

(5) See post, tit. Insurance.

(6) Edw. Ad. Rep. 72.

to freight, neither is the captor nor the crown (1). But, under circumstances, the Court of Admiralty have decreed a moiety of freight to be given, though the voyage was not completed (2). If the captor performs the contract of the vessel, he is entitled to freight; but if the captor have done any thing to the injury of the property, or have been guilty of any misconduct, he may remain answerable for the effect by way of set-off (3); and the owners of a cargo will be allowed to deduct, from freight decreed to the crown, monies advanced to the master to enable him to prosecute his voyage. (4)

The time and manner of payment of freight are frequently regulated by express stipulations in a charterparty, or other written contract; and when that is the case, the payment must be according to such stipulations; but if there be no express stipulation to the contrary, or inconsistent with the right of lien, the goods conveyed generally remain as a security until the freight is paid, for the master or owner is not bound to deliver them, or any part of them, without payment (6) of the freight and other charges in respect thereof. Where (7) the defendant, as owner of a vessel, covenanted by charterparty with A. as freighter, to take on board a cargo in the Brazils and deliver the same in England, A. covenanted to put the cargo on board, and pay freight at a certain rate per ton, part in money on the arrival of the vessel, and the remainder by bills at two months after the delivery of the cargo, and the owner bound the vessel and her freight, and the freighter bound the cargo, for the due performance of their respective covenants; and part of the cargo was shipped for A., and part for their consignees; and the defendant delivered the goods to the other consignees, on payment of the freight at a less rate than that contracted for by the charterparty, but refused to deliver to the plaintiffs the goods consigned to A., which A. had assigned to them, without their paying the whole of the freight due under the terms of the charterparty: it was held, that the defendant was justified in detaining the goods of the plaintiffs, until payment of the freight stipulated for by the charterparty, as the delivery of the goods and the payment of

Of the lien
for freight. (s)

(1) See Edwards Ad. Rep. 56.

(2) Id. 246.

(3) 4 Rob. 282.

(4) Edwards Ad. Rep. 232.

(5) See post, tit. Lien.

(6) Dougl. 194. Abbott, 4 ed. 258. 4 B. & A. 50.

(7) 8 Taunt. 280.

the freight were to be considered as concomitant acts. So where the owner of a vessel covenanted by charterparty to let the vessel on freight, and to deliver the cargo in good condition, and the freighters covenanted to pay the freight on delivery of the cargo in good condition, part in money and the remainder by bills at four months; it was held that the owner might detain the cargo until payment of the freight, the delivery of the cargo and payment of the freight being concomitant acts. (1)

This right of lien is generally stipulated for in charterparties, bills of lading, or other contracts of affreightment; but it would in general exist without such stipulation. The right to freight always follows the ship (2); the cargo is bound to the ship, as well as the ship to the cargo, and the master may detain any part of the merchandize for the freight, &c. of all that is consigned to the same person (3); but the master cannot detain the cargo on board the vessel until these payments are made, as the merchant would then have no opportunity of examining their condition. In England, the practice is to send such goods as are not required to be landed to any particular wharf, to a public wharf, and order the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment (4). No right of lien for freight can exist, unless the freight has been earned; if the freighter or a stranger prevents the freight from becoming due, the shipowner or master's remedy is by action for damages. (5)

In some cases this right of lien cannot arise, as where the owners of the vessel, by the charterparty or other contract, parts with the possession of the vessel, or, in other words, demises the ship to the owners of the cargo for the time of the hiring. The question, whether or not the owner does so demise the ship, must necessarily depend upon the intention of the parties, and the apt words of hiring and letting apparent on the face of the contract (6); and though there be a clause in a charterparty or

(1) 8 Taunt. 293.

(2) 8 Price, 542.

(3) Abbott, 258. Soldergreen v. Flight, Sit. p. T. T. 1796, at Guildhall.

(4) Abbott, 259.

(5) 3 M. & S. 205.

(6) See 2 Brod. & B. 410. 5 B. Moore, 211. 3 Barn. & Ald. 497. 2 B. & A. 503. 4 M. & S. 288. 2 Marsh. 339. 8 Taunt. 280. Cowper, 143. 13 East, 238. 3 Esp. 27. 2 Camp. 482.

other instrument of affreightment, giving a lien on the cargo for the payment of what is usually denominated freight, yet the owners will not in all cases have the benefit of this clause. To this purpose the following case is in point: two persons, who were factors, hired a ship of one Paul, at the rate of £48 per month, and executed a charterparty, by which the goods to be put on board were made liable to him, and they had power to appoint the master and mariners. Some merchants in the West Indies loaded the ship with goods, and allowed the factors £9 per ton for the carriage; the factors, who had thus chartered the ship in their own name, became bankrupts. Paul instituted a suit in the Court of Chancery, to compel the merchants to pay him for the hire of the ship, insisting that they were liable to do so, by reason of this clause in the charterparty; but the Lord Chancellor, Hardwicke, decided that he should recover of them no more than they had engaged to pay the factors for the freight, and that they were not liable to make up the deficiency to him. His lordship observed, that by the general law, the cargo is liable to pay the freight, but that in this case the £48 per month was improperly termed the freight of the goods, being rather the hire of the ship: that the factors had made an agreement with the master on their own account, and not on the part of the merchant, and therefore the merchants were not liable, otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of a ship and the original owners of it. A person, said his lordship, that lets out a ship to hire, ought to take care that the hirer is a substantial man; it is his business to look into this; and if the persons who hire are not competent, the master must suffer for his neglect: whatever hardship therefore there may be on the one hand to the person who lets out to hire, the hardship is much greater on the other side; and what gives additional weight to the merchant's case, is the great convenience this gives to trade in general (1). The master has no lien to detain goods actually brought, for the payment of what is usually called dead freight (2). A third person, wrongfully in possession of goods, cannot detain them from the consignee or owner, on the ground of the latter's refusal to pay freight. (3)

(1) 2 Atkins, 621.

sed vide 2 Marsh. 339.

(2) Abbott, 260. Bull, N.P. 45.
15 East, 547. 3 M. & S. 205.

(3) 3 East, 585.

If the owner or master of the vessel part with the possession of the whole cargo, his lien is entirely gone. Great care and prudence should be observed in this respect, for considerable risk falls on the master by parting with the possession. It often becomes his duty to exercise the right of lien both for his own and the consignor's benefit; for where goods are consigned by one merchant to another, it might often be highly prejudicial to the consignor to be called upon at the ship's return to pay the freight, which he had reason to expect the master would obtain from the consignee. And where an action was brought for freight on a charterparty, by which it was agreed that the goods should be delivered at London agreeably to the bills of lading, and by the bills of lading they were to be delivered to a third person on his payment of the freight, and in fact they were delivered to him, but he refused to pay the freight, because the merchant, the defendant, who was the consignor, was indebted to him to a greater amount, Lord Kenyon, Ch. J. held, that the freight could not be recovered of the consignor, for the master ought not, by the terms of the contract, to have delivered the goods without receiving the freight from the consignee (1). Many difficult questions have arisen as to what shall be considered as a parting with the possession of the goods, to abandon this right of lien. The general law of lien, however, prevails throughout all the cases on this subject (2). The delivery of part of the cargo does not divest the owner's right of lien to detain the residue, though the freighter is to pay by bills bearing date from the day of the delivery of the cargo (3); and when the freighter does pay by bills, such bills should be dated of the day of the first delivery (4). By the 44 Geo. 3. c. 100. s. 6. it was enacted, that if goods brought into the London Dock Company's dock to be landed, are not duly entered with the customs and excise within seven days after the ship is reported at the custom-house, the officers of the company may cause the goods to be landed and warehoused under the joint locks of the officers of the customs and excise; and that if the duties are not paid within thirty days after the report of the ship, the commissioners of the customs, or proper officers of the excise, may sell them to satisfy the duties, rendering the overplus to the

(1) *Pernose v. Wilks*, Sit. p. mine a right of lien, post, tit. Lien.
H. T. 1790. Abbott, 290. (3) 8 Taunt. 280. 293. 202.

(2) See, as to what will deter- (4) *Semb. id.*

proprietor or consignee; and a subsequent statute (1) has provided, that all goods so landed or warehoused shall be subject to the same lien for freight in favour of the master and owners as while they remained on shipboard; and the company is authorized and required, upon notice given by the master or owners, to detain the goods until the freight shall be paid or satisfied, together with the rates and charges to which the same shall have become liable. And by 54 Geo. 3. c. 228. s. 18. this lien for freight exists in goods warehoused in East India docks, under the provisions of that act, in the same manner as if they had not been there warehoused (2); and so it exists for goods warehoused under the like circumstances in the West India docks; and in these cases no notice need be given, though it is advisable to give one. (3)

If the owners or master part with their lien, they must resort to other remedies for the payment of the freight. If there be a charterparty or contract for the payment of freight under seal, an action for the recovery of the entire freight must be framed thereon (4). An action for the recovery of freight *pro rata itineris*, must in general be brought in assumpsit upon an implied promise to pay it. An action for freight must in general be brought by and against the person with whom the contract is made. If there be a contract of charterparty under seal, the parties to the deed must sue and be sued; but if the contract be not under seal, and made with the master, the action may be brought either in the name of the master or the shipowner. But where a contract under seal was made by the captain with the freighters on behalf of his owners, it has been decided, that the owners cannot maintain assumpsit against them for freight, for the charterparty is conclusive, and the implied promise is merged in the specialty. If, indeed, there be a promise independent of the charterparty, an action may in certain circumstances be maintained (5). The captain of a vessel may in some cases, without any express contract with him, maintain an action against the consignee of goods under a bill of lading, upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment. (6)

Of the action
for freight.

(1) 45 Geo. 3. c. lviii. s. 15.

(2) See 3 Barn. & Ald. 498.

(3) See 39 Geo. 3. c. 69. 1 M.
& S. 157.

(4) 1 New Rep. 104.

(5) 12 East, 578.

(6) 4 Taunt. 4.

Who is the person liable for the payment of freight.

The party who, in the contract of affreightment, agrees to pay freight, is the person primarily liable for the payment of it. The question in most cases, where a party is sought to be charged with the payment of freight, is, whether the contract for the payment of it was made with him or not? Under a bill of lading, by which goods were to be delivered "to J. A., net proceeds paid to H. T., as *per* advice, or to his assigns, he or they paying freight for the said goods as *per* charterparty;" it was held, that the freight was payable by J. A., and that H. T. was only entitled to what remained after such payment. (1)

If a consignee receive goods in pursuance of the usual bill of lading, by which it is expressed that he is to pay the freight, he by such receipt raises an implied contract to pay it, and makes himself a debtor for the freight, and may be sued for it (2); and in general the consignee, indorsee, purchaser, or other party who accepts the goods, becomes liable for the payment of freight by accepting the goods, whether there be any other agreement or not (3). If, by a bill of lading, goods are made deliverable to A. or his assigns, he or they paying freight for the same, and A. assigns the bill of lading to B., and B. assigns it to C., who accepts the goods under it, C. is liable for the freight (4). So, although the indorsee receives the goods from the London Docks, and pays over the proceeds to the indorser before freight is demanded (5). Where three partners, A., B., and C., ordered goods from abroad, and then dissolved partnership, and made over their property to trustees for their creditors, leaving A. and B. as agents to settle the affairs of the firm, and the goods arrived and were delivered to A. and B.; it was held, that C. was not liable for the freight. (6)

If there be an express contract or charterparty under seal, which, by its terms, stipulates that the consignor of the goods shall be alone liable to the shipowners, then indeed the consignees or indorsees of a bill of lading would not be liable to pay the freight by the mere acceptance of the goods; but it would be otherwise, if there were any fresh contract with such consignee or indorsee for the payment of freight. (7)

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| (1) 2 Brod. & B. 450. | 23. 4 Rob. 236. are overruled. |
| (2) 2 Show. 443. | (5) 3 Camp. 545. |
| (3) 13 East, 399. | (6) 5 Taunt. 612. 1 Marsh. 248. |
| (4) 13 East, 399. 2 Camp. 587. | (7) See 2 M. & S. 303. Ham- |
- The cases on this point in 1 Esp. mond's Index, tit. Freight, p. 485.

Though, generally speaking, any one, notwithstanding another may be consignee or indorsee of a bill of lading, who accepts goods on his own account is chargeable with their freight, yet where he declares he is acting only as agent for another, he will not be charged by acceptance; and a person who is only an agent for the consignor, and who is known to the master to be acting in that character, does not make himself personally responsible for the freight by receiving the goods, though he also enters them in his own name at the Custom-house. (1)

The master of a freighted vessel, by signing a bill of lading containing the usual clause, "to deliver the goods to the consignee or his assigns, he or they paying freight for the same," coupled with his delivery without first exacting freight, does not relinquish his right to demand it from the freighter (2). The master by taking an indorsement on the charterparty, requesting the consignee to pay freight, and omitting to give notice of nonpayment, does not discharge the consignor (3). A carrier, by taking a bill of exchange from the consignee drawn upon the consignor, but which he refuses to accept, does not forego his remedy against the consignor (4). A covenant for payment of freight on delivery of goods is not discharged by the master's taking from the freighter's agent a bill on a third person, which is not duly paid, although the agent fail with the amount in his hands (5); but it would be otherwise if a cash payment being offered, the master prefers a bill, or the master should so act as to take the bill in full satisfaction of the demand for freight (6). In an action of covenant upon a charterparty for freight, it is no defence that the plaintiff received part of the freight in money from the defendant's agent abroad, and the residue in a bill (without the privity of the defendants) drawn by the agent upon, and accepted by certain merchants in London, and which bill was afterwards dishonoured upon the insolvency of the drawer and acceptors; and in that case it was held, that the defendants were still bound to pay the freight owing to the plaintiff, and such bill was not to be deemed payment, though the defendants were not informed of the trans-

How the right of freight is relinquished and determined.

(1) 1 East, 507. 1 M. & S. 571.
2 M. & S. 303. See 1 Marsh. 146.
5 Taunt. 477.

(2) 1 Taunt. 300. 13 East,
565.

(3) 1 Taunt. 300.

(4) 8 T. R. 451. 2 Campb. 515.

(5) 4 Campb. 257.

(6) Id. Holt, C. N. P. 75.
3 East, 147.

action after the failure of the parties to it (1). A clause in a bill of lading, acknowledging that freight has been paid at the port of lading, or that freight is to be paid there, will not subject the shipper to the payment of freight, if the vessel be lost on the voyage. (2)

When recover-
able back.

Under an express or implied agreement to pay freight before the commencement of the voyage, if the freighter does pay it, and the voyage is commenced, he cannot recover it back, though the voyage through the perils of the seas be not completed; an implied contract of this nature may arise from established usage (3). But in the absence of this contract, if freight be paid in anticipation, and the voyage fail, it may in general be recovered back (4). If the consignee or other party, in order to obtain possession of his goods, pay more freight than he ought, he may recover it back. (5)

IV. Passage
Money. (6).

Passage money is the sum claimable for the conveyance of a person, with or without luggage, on the water. The only difference, therefore, between freight and passage money is, that one is claimable for the carriage of goods, and the other for the carriage of the person. The same rules which govern the claim for freight affect that for passage money. Few observations, therefore, on this head will be necessary, and we shall only notice a few miscellaneous decisions under it.

There is no implied promise on the part of an officer in the East India Company's service to pay the captain of a company's ship, by which he returns to England, more than the regulated sum for his passage, although it may have been usual to pay more (7). Where the plaintiff contracted to carry the defendant, his family and luggage, from Demerara to Flushing, and in the course of the voyage, within four days sail of Flushing, the ship was captured by an English ship of war, and brought into England, and the ship and cargo libelled for prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship, but the defendant and his family were

(1) Holt, C. N. P. 72.

(2) 1 Camp. 84.

(3) 4 Camp. 241. 5 Taunt. 435.

(4) 1 Camp. 84. 1 Marsh. 122.
2 Bos. & P. 321. 2 Show. 283.
Semb. cont.

(5) Holt, C. N. P. 346. As to
the recovery back of money paid

under a mistake, see ante. 160.

(6) As to the law and legislative enactments, regulating the conveyance and duties of passengers, see 2 Holt on Shipping, 123.

(7) 2 Camp. 15.

liberated, and their luggage in fact restored to their possession ; it was held, that however the question might be as to the plaintiff's right to recover passage money upon an implied assumpsit *pro rata itineris*, if the ship were restored, yet pending the proceedings against the ship as prize in the Admiralty Court, no such action could be maintained, for *non constat* but that the ship might be condemned, and the freight decreed to the captors (1). Where the captain dies before the commencement of the homeward voyage, his estate is entitled to the benefit of any contract he may have entered into for the conveyance of passengers (2). But after his death, contracts made by his successor are for the latter's own benefit (3). The master of a vessel has a lien upon the luggage of a passenger for the passage money, whether the price has been settled between the parties or not, but he has no right to detain the person of the passenger, or the clothes which he is actually wearing (4). Amongst other clauses in the charterparty by the East India Company, there is usually one by which the company agree to pay to the owners in England £14 for each passenger ordered on board the ship by any of their agents from any of their settlements. It has been decided, that this sum was payable for each passenger ordered on board the ship in India, by the company's agents, notwithstanding the loss of the ship before her arrival in the Thames (5). The principle of this decision was, that an extra expense was incurred by the owners laying in a stock for the necessary subsistence of the persons ordered on board by the company's agents, which expense is incurred whether the ship arrive or not ; nor is such charge repelled by the stipulation in the charterparty, that, " if the ship do not arrive in safety in the Thames, the company shall not be liable for freight and demurrage, or for any demands in respect of the ship's earnings in freight voyages for the company, or on account of any other employment ;" for construing the latter words according to the context, they mean the employment of the ship in any other adventure, and in no degree apply to the putting of the passengers on board (6). Where a passenger expressly contracts to pay, or where, from established usage, he is bound to pay, and does pay his passage money before the voyage commences, and the ship commences the voyage, but

(1) 5 East, 316.

(2) 3 Camp. 253.

(3) Id.

(4) 2 Camp. 631.

(5) 10 East, 468. 1 Black. 291.

(6) Abbott, 4 ed. 219. 2 Holt on Shipping, 51.

is lost before the completion of it, he cannot recover back the money paid; but if the ship is lost before the commencement of the voyage, the money paid by anticipation must be returned. (1)

V. Demur-
rage. (2)

Demurrage is an allowance made to the master or owners of a ship by the merchant freighter, for being detained in port longer than the time appointed and agreed for its departure. Demurrage indeed is nothing more than a kind of extended freight (3), being a reasonable compensation for the use of the ship. In order to meet the ordinary circumstances of some unforeseen delays in loading or unloading, it is usually specified in charterparties and bills of lading that a certain number of days, called running or working days, shall be allowed for receiving or discharging the cargo, and that the freighter may detain the vessel for a further specified time, or for so long as he pleases, upon the payment of so much *per diem* for such over time. In many cases, the contract is, that the vessel shall be loaded and discharged in the usual time, or within a reasonable time after her arrival in port. In others, this condition is altogether omitted; in which case, if the ship be improperly detained by the merchant, the owner may frequently have a special claim to damage, in the nature of demurrage. The word "days," used alone in a clause of demurrage for unlading in the river Thames, is said to be understood as working days only, and not to comprehend Sundays and holidays (4); but to obviate any difficulty in this respect, the meaning of the parties, whether the days should be working or running days, should be always expressed in the contract. Where A., B., C., & D. agreed to purchase a cargo of coals in certain proportions, to be severally taken and received out of the ship by them respectively, at the rate of forty chaldrons *per* day, and to settle their turns among themselves; and further agreed, that in case of any loss or demurrage by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults, at the rate of forty chaldrons *per* day. The whole cargo would have been cleared in nine days; but in consequence of the days being wet, only five chaldrons were taken

(1) 4 Camp. 241. See also, (3) Per Heath J. in *Jesson v. Taunt.* 435. See ante, 424, n. 4. Solly. 4 Taunt. 54, 5.

(2) See 2 Holt on Shipping, 13. (4) 3 Esp. 22.

out on that day, and on the tenth day some of A.'s coals remained on board; it was held that *working* days only were within the meaning of the contract, and that as one day was wet, A. was not bound to pay demurrage for the tenth day. (1)

A clause allowing a ship seventy days stay at A. & B., for the purposes of loading and unloading her cargo, means seventy days at each place (2). Where a certain number of days are fixed for allowing the ship's stay on demurrage at the ports of loading and discharge, no demurrage is claimable in respect of a detention at an intermediate port, though damages in the nature of demurrage might, under circumstances, be given for such detention (3); and in the case of a charterparty, by which a ship was to sail from London to join convoy, and proceed from thence to Barcelona, and there deliver her cargo, and forty-one running days were to be allowed to wait at Portsmouth for convoy, and to discharge the cargo at Barcelona, the said forty-one days to be accounted and commence at Portsmouth twenty-four hours after her arrival there, and at Barcelona the day the ship should be ready to deliver her cargo, and for all the time beyond the forty-one days, thirteen shillings per ton were to be allowed for demurrage; it was held the demurrage was only payable for delay beyond the forty-one days in waiting for convoy at Portsmouth, and in discharging the cargo at Barcelona, and not for delays which the ship had experienced in waiting for convoy at Falmouth, to which place she was ordered to proceed from Portsmouth, by the admiral's secretary, and at Gibraltar bay, into which she sailed under the direction of one of the sloops appointed to convoy the fleet, the rest having been dispersed in a storm, and where she waited twelve days for convoy to proceed to Barcelona (4); but he would perhaps have been liable, if the number of days had been expressed for waiting for convoy generally. (5)

In general the cause of detention, to entitle the owners to demurrage, ought not to be called in question, if it was not through the fault of the owner, or occasioned by any hostile detention, or by the perils of the seas while at sea. Where the

Demurrage when claimable, with reference to the cause of detention.

(1) 2 New Rep. 258.

2 Chitty's Rep.

(2) 2 Chitty's Rep.

(4) 1 Esp. 367.

(3) 1 Esp. 367. Abbott, 222.

(5) Abbott, 223.

contract of affreightment expressly stipulates that so many days shall be allowed for the discharge of the cargo, and so many further days at so much *per diem* for any over time, the Courts will interpret that such a limitation is an express stipulation on the part of the freighter that the vessel shall in no event be detained longer, and that if detained, it shall be the delay of the freighter: under these circumstances the freighter will be liable for demurrage, according to the terms of the charter-party, even where the delay is not occasioned by any fault on his part, but is inevitable; if, therefore, by the crowded state of the London docks, a ship is detained there before she can be unloaded a longer time than is allowed for that purpose by the contract of affreightment, the freighter is liable for this detention to the owner of the ship (1); and it is no defence to an action for demurrage, that the delay arose from port regulations or custom-house restraints (2), or even from an unlawful act of custom-house officers (3); and demurrage is due in a case of detention of a cargo under a prohibition by a foreign government to export the intended article (4). So where a certain number of days is allowed in a charterparty for loading, the freighter is liable for a subsequent detention for that purpose, though the loading within the specified period was rendered impossible by the weather, as where the port was frozen up (5). In a general ship, if the consignee by the bill of lading undertake to pay demurrage, it is no excuse that he was prevented from taking his goods by the circumstance of their being stowed under the goods of other consignees (6); and the freighter or consignee will be clearly liable, if he actually occasioned the delay, as where he neglects within proper time to apply for, or does not obtain of the treasury, a licence to land particular goods. (7)

In some contracts of affreightment, the condition is, that the ship shall be unloaded and discharged within the usual and customary time of ships in the port of delivery and discharge, or simply within the usual and customary time. In this case the freighter is not liable for any delay which may arise from the

(1) 2 Campb. 352. 12 East, 179. Abbott, 196. 2 Holt on Shipping, 14. 12 East, 179. 3 Taunt. 387.

(2) 4 Campb. 131. 159. 327.

(3) 4 Campb. 131.

(4) 3 Bos. & Pul. 295.

(5) 4 Campb. 335. id. note.

(6) Holt, C.N.P. 35. 3 Taunt. 387.

(7) 4 Campb. 327. 1 Stark. 111. 2 Campb. 483. 488.

ordinary course of business in the port or custom-house of the place of discharge (1). So, where the contract of affreightment is silent as to the time within which the goods are to be unloaded, the meaning of the contract will be, that they shall be unloaded within the usual and customary time; and no action will lie upon the implied undertaking to unload them within the usual time, where the consignee is prevented from so doing by the state of the docks, without any default of his own. (2)

Demurrage is not claimable for a delay occasioned by the hostile detention of the ship, or what is equivalent to it, the hostile occupation of the intended port (3), neither is it claimable for any delay wilfully occasioned by the master or owners or crew of the vessel; and therefore demurrage is not claimable if, before entering the port, the master knew that an embargo was laid on the exportation of the commodity he is sent for (4); and the freighter is not liable for a delay in obtaining the ship's clearances, which it is the business of the shipowner to procure (5). It is not necessary to entitle the owners to demurrage for goods consigned by bill of lading, that the master should give notice of the ship's arrival to the consignee, though the residence of such consignee is known (6); *a fortiori*, where the consignees are indorsees of the bill of lading (7). A freighter is not liable for demurrage for delay occasioned by the winds and sea, while the ship is out of port, as the accidents of the sea belong to the ship, and the delays of the port to the freighter. (8)

The claim for demurrage ceases as soon as the ship is cleared out and ready for sailing (9); the payment of demurrage stipulated to be made while a ship is waiting for convoy ceases as soon as the convoy is ready to depart, and in either of these cases the claim for demurrage ceases, although the ship may happen to be further detained by adverse winds or tempestuous weather; and if after having once set sail on her voyage, she is driven back into port, the claim of demurrage is not thereby revived. (10)

When the right to demurrage ceases.

(1) 2 Holt, 25. 2 Campb. 483.

(2) 2 Campb. 488.

(3) 10 East, 526.

(4) 3 Bos. & Pul. 295. n.

(5) 4 Campb. 335.

(6) 4 Campb. 161.

(7) 4 Campb. 159.

(8) 10 East, 526.

(9) Jameson v. Lawrie, House of Lords, 10th Nov. 1796, Montefiore's Dic., tit. Demurrage.

(10) 2 Bro. P. C. 50. 6 Bro. P. C. 474. Abbott, 196.

* Who entitled to.

There must always be an express or implied contract for demurrage, and the party with whom the contract is made is the party entitled to the demurrage. The master of a ship, without any special contract to that effect, cannot in general recover for demurrage upon an implied promise to pay it (1); but if, by the terms of the bill of lading, the goods are not deliverable until payment of demurrage, then it should seem the master may, in analogy to his right in this respect as to freight, sue for demurrage.

Of the party
liable to.

Any person taking goods under a bill of lading, makes himself liable to all its terms, and therefore to pay demurrage, if that were expressly stipulated. The principle indeed is one of the most manifest equity, that if the consignee or third person accepts the fruits of the contract with a full knowledge of the terms, he is bound by it, and cannot send the captain back to the consignor for demurrage (2), and the law relating to freight in this respect seems here applicable. The consignor is also liable. (3)

Of the remedy
for demurrage.

The claim for demurrage is in general favoured by our courts (4). It seems that without any express contract to that effect, (as that the goods are not to be delivered until payment of the demurrage), no lien arises for demurrage (5), and the owners must usually resort for remedy to recover it by action formed on the contract; as we have before seen, the payment of demurrage arises out of a contract express or implied, and is not claimable for any detention arising *ex delicto* (6). When the contract for demurrage is under seal, the party entitled to it must frame his action thereon, on the covenant to pay it, or in debt on the deed (7). In case the freighters in a contract under

(1) 4 Taunt. 52. 189. Holt, 35.
6 Taunt. 65. 3 Campb. 320.

(2) 6 Esp. 16. 13 East, 399.
1 M. & S. 157. 4 Taunt. 52.
4 Campb. 159. 161.

(3) 2 Campb. 352. 12 East,
179. 4 Taunt. 52. Holt, C. N. P.
35. 4 Campb. 131. 1 Stark. 111.

(4) 2 Holt, 24.

(5) See 3 M. & S. 265. 2 Mer.
401. 15 East, 547. 4 Taunt. 3.
sed vide 2 Marsh. 339. The dif-
ference in this respect between this

and freight, seems to be, that a lien
for freight is claimable, because
freight is payable for the use of the
ship in the conveyance of the goods
whereon the lien is claimed;
whereas demurrage is not always
payable for the use of the ship in
the conveyance of the goods, but
for delays of the ship at ports in
loading and unloading, and other
circumstances.

(6) 2 Esp. 708.

(7) 1 New Rep. 104.

seal covenant to pay demurrage for any detention, to the amount of a specified number of days, and the freighters detain the vessel longer than such specified time, it should seem the action to recover demurrage beyond that time should not be brought on this covenant to pay demurrage, but upon the freighters implied covenant to redeliver the vessel at the expiration of the specified time, and the jury will usually give in damages the amount of the sum agreed upon for the stipulated days of demurrage, for the subsequent detainer (1); but it is open to the respective parties to shew, that greater or less damage has been sustained (2), and it should seem that this principle would apply to contracts of this nature not under seal; and if there be no contract for demurrage, the declaration should be special on the implied contract to ship or unship the goods in a reasonable time. (3)

In general the master undertakes by the bill of lading to deliver the goods upon payment of freight, with *primage* and *average*. The word *primage* denotes a small duty to be paid to the master, for his care and trouble relative to the goods, over and above the freight, unless he has otherwise agreed with his owners. It also seems to be a small duty due to the master and mariners of ship, to the master for the use of his cables and ropes to discharge the goods of the merchant, and to the mariners for loading and unloading of the ship or vessel, in any port or haven; this is usually about 12*d.* per ton or 6*d.* per pack or bale, according to the custom in different voyages and trades (4). It is sometimes called the master's *hat money*.

VI. *Primage.*

Privilege is an allowance to the master of the same general nature with *primage*, being compensation, or rather a gratuity customary in certain trades, and which the law assumes to be a fair and equitable allowance, because the contract on both sides is made under the knowledge of such usage by the parties. If the existence of such privilege be questioned, it will be inquired into by the evidence of merchants (5). In an action (6) by the owners against the captain of an East India ship, it was con-

VII. *Privilege.*

(1) See 2 Chit. Rep. 4 Campb. 131. 12 East, 179.

(2) 2 Campb. 616.

(3) See 2 New. Rep. 258.

(4) See Jacob, Dict. *Primage*.

(5) 2 Holt on Shipping, 122.

(6) 1 Stark. 210.

tended for the captain, that the stipulation of a sum in lieu of privilege and *primage*, did not exclude him from the use of the cabin, customary in East India ships; by the contract between the parties, he was to receive a certain sum in lieu of privilege and *primage*; but under an alleged custom of trade, he had still retained a part of the cabin for himself, and employed it for carrying goods, for which he had received the freight. The owners brought the action for the amount of this freight, and contended that the terms of the contract excluded all right, on the part of the captain, to use the cabin for the carriage of goods on his own account; the evidence offered for the defendant was chiefly a conversation between the plaintiff and himself, by which it appeared that both of them understood the term privilege in this qualified sense; Gibbs, C. J. admitted this evidence, upon the principle that the word privilege was a term of very indeterminate signification; that in general it must be taken to mean what the mercantile part of the nation understand it to be in their several trades, but that the parties in a particular contract might limit or enlarge this sense. The evidence being accordingly admitted, and proving that privilege in the trade in question was always understood in the sense contended for by the captain, and was so understood by the parties in the action, the court accepted it in that signification, and the defendant had a verdict.

VIII. Average.

Average is a contribution which the owners of the goods and others, make towards the losses or expences incurred towards the prevention of losses to ships and their cargoes, from the time of their loading and sailing, to their return and unloading. There are three sorts of averages, viz. the simple or particular averages, the large or general, and the small.

Particular Average.

1st. The simple or particular average consists in the extraordinary expences or damage incurred for the ship alone, or for the merchandize alone, such as the loss of anchors, masts, and rigging, occasioned by the common accidents at sea, the damages which happen to merchants by storm, *prize*, shipwreck, wet, or putting, all which must be borne and paid by the party that suffered the damage. Sir William Scott observes (1) the loss

(1) 1 Robinson's Rep. 293.

of an anchor or cable, the breaking of a plank, are matters of simple or particular average, for which alone the ship is liable. Should a cargo of wine turn out sour on the voyage, it would be a matter of simple average, which the owner thereof alone must bear. There might be a simple average, for which both the owners of the ship and of the cargo would be severally liable, under a misfortune happening to both ship and cargo at the same time, and from a common cause, as if a waterspout should fall on a cargo of sugars, and a plank from the same violence should start at the same time,

2. The *large and general average* is a contribution to be made by the owners of the ship and cargo to those expences and damages incurred and sustained for the common good and security of both the merchandize and vessel. Three things are necessary to constitute a claim upon the ground of general average; first, that there should be a special sacrifice, which must be something done, and not suffered, by one or more, for the benefit of the whole; secondly, that it should be for the purpose and with the intent (*causâ et mente*) of the preservation of the common concern; and thirdly, that the common concern should be benefited by the partial sacrifice (1). It would perhaps be a useless extension of this work to consider in detail the various cases on this subject, which all confirm the above general rule. The decisions in all questions on the subject must depend on the particular facts of each case. (2)

General
Average.

What will constitute a legal claim for general average.

If sails are blown away, or masts or cables broken by the violence of the wind, the owner alone must bear the loss (3); but if the master, compelled by necessity, cut his cable from the anchor, in order to use it as a hawser (4), or if he cut away and abandon his masts (5), sails, or cables, to lighten and preserve the ship, their value must be made good by contribution. In like manner (6), the damage done to a ship by the cutting its deck or sides, in order to facilitate a necessary jettison, or by running it on a rock, shallow, or strand, to avoid the danger

(1) See 2 Holt on Shipping, 185.

(2) See 1 East, 220. 2 T. R. 407.

(3) Abbott, 4 ed. 360. Postlethwaite's Dic. tit. Average, Montefiore's, id.

(4) 1 East, 220.

(5) *Marshall v. Dutton*, Select Cases of Evidence, p. 58. Dig. 14. 2. 3. & 5. 1. Abbott, 360.

(6) Id. Dig. 14. 2. 2. 1.

of a storm, or of an enemy, and the expence of recovering the ship (1) from this latter situation, and also the pilotage, port duties, charges, and expences incurred by taking a ship into a port, to avoid an impending peril, and the expence of extraordinary assistance (2) to preserve and secure a ship from the violence of a storm at its entrance into the port of destination, are to be sustained by a general contribution. So if it be necessary to unlade the goods in order to repair the damage done to a ship by tempest, so as to enable it to prosecute and complete the voyage, the expence of unlading, warehousing, and reshipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage (3). So articles made use of by the master and crew, upon the particular emergency and out of the usual course, for the benefit of the whole concern, and other like expences, are the subjects of general average (4); but the master's expences during the unloading, repairing, and reloading, and crimpage to replace deserters during the repairs, are not the subject of contribution (5); nor are wages and provisions, whilst in port in consequence of tempest, the subject of general average (6). So where the master of a ship, in a foreign port, was arrested by process out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo; it was held that the owner of such part had no right to a contribution in nature of general average from the shippers of the other goods, which arrived safe at the port of destination. (7)*

The repairs and refitting of a ship are not in ordinary cases the subject matter of general average, but may occasionally become so, when they are rendered necessary for the sake of the cargo; for example, where the ship would be injured or endangered unless such refitting and repairing were made in the course of the voyage, though the ship itself without a cargo, or

(1) 3 M. & S. 482. Molloy, 289. 2 T. R. 407. 2 Rob. 257.
 book 2. chap. 6. sec. 15. Beawes, Abbott, 359.
 165. Wellwood, tit. 20. Abbott, (4) Id.
 360. 3. (5) 3 M. & S. 482.
 (2) 1 East, 220. (6) 4 M. & S. 141.
 (3) 3 M. & S. 482. 1 Rob. Ad. (7) 3 Campb. 480.

without such a cargo, might have worked its passage homewards, or to the port of its destination (1). It has been said, that if a ship be obliged, from whatever cause, for the safety of the whole concern, to return to port, whatever expences are absolutely essential to enable her to prosecute her voyage may be considered as a general average; but if the ship by such expenditure gain a lasting benefit (2), there must be a deduction on that account of so much, which must be placed wholly to the ship owner's account; that the repairs with the foregoing limitation were general average, so likewise the expences of unloading the cargo, to make them, but not the wages or expences of the crew, recruiting them, or the like (3). It has been also observed, that if the repairs were merely such as were necessary to enable the ship to prosecute the voyage, and were afterwards of no benefit to the ship, such repairs would come under a general average (4). It seems, that in order to determine whether expences incurred in consequence of a ship being obliged to go into port, are to be considered as general average, the cause which compelled her, whether it were the violence of the elements, or a collision with another ship, is not material (5). Where a ship was put back for the mere purpose of refuge and delay, and the repairs of some cordage lost in a storm, it was held that such putting back for shelter, and such repair of the mere damage of the ship, without any necessary connection with the safety of the cargo, were in no degree subjects of general average by the law of England (6). By a covenant by the owner of a chartered vessel to keep it in repair during the term, it seems that he excludes himself from the claim he would otherwise have against the chartered party, on a general average, arising out of repairs. (7)

The loss must be occasioned in the sole object of preserving both the ship and cargo, and this object must be in view at the time of the loss. Where a mainmast was broken in a heavy gale, by carrying an unusual press of sail, in order to escape from an enemy, to whom the ship had struck, it was held not a subject of general average (8). So where a ship, being unable to escape

(1) 2 T. R. 407. 8 T. R. 509.
2 Holt on Ship. 189.

(2) The criterion is whether, having finished the adventure, the repairs are any longer of use to the ship, or whether they were merely temporary, 3 M. & S. 482.

(3) 4 M. & S. 141.

(4) 3 M. & S. 482.

(5) *Id.*

(6) 4 M. & S. 141.

(7) 8 T. R. 509.

(8) 2 Bos. & P. N. R. 378.

from a privateer, resisted the attack, beat off the privateer, reached her port, and delivered her cargo in safety; it was held that neither the expence of repairing the ship, nor of curing the wounds of the sailors, nor of ammunition, was the subject of general average (1). No claim for general average can arise from an act done to redeem the master of a ship from an imprisonment under an arrest for debt. (2)

As property is not altered by capture, and still remains in the owners till divested by regular condemnation, the owners of a ship and cargo have a claim to general contribution for ship's stores necessarily thrown overboard after a vessel is captured, and whilst she is in the hands of the enemy, and before condemnation (3); and the circumstance of an owner having effected an insurance, will not prejudice his right to recover the general average; the reason is, that there is always a *spes recuperandi*, and a postliminious right (4). Upon an embargo or detention, where there is an abandonment of both ship and freight to the respective insurers, and the owner is paid as for a total loss, and notwithstanding the ship is released and earns freight, the wages of the crew, the port and other charges, are *quasi* a general average, or salvage on the ship and freight, according to the particular nature of such charges and the persons to whom they belong; and in an action for money had and received by the underwriters on the freight against the insured, who has received it, he may deduct the same out of the sum recovered. (5)

In general, any thing that is lost for the benefit of the whole concern, will form the subject matter for general average; but when an entire ship is taken to freight by a merchant, and the master, without his consent, wrongfully take on board the goods of other persons, and such goods be afterwards cast overboard, to lighten the vessel, the merchant freighter is not bound to contribute to the loss (6). The French ordinance, in express terms, excludes from the benefit of general average goods stowed upon the deck of the ship (7), and the same rule prevails in practice in this country (8): goods so stowed may in many cases

(1) 2 Marsh. 309. 6 Taunt. 608. Holt, C. N. P. 193.

(2) 3 Camp. 480.

(3) 4 Taunt. 123.

(4) Id.

(5) 3 Smith, 39. 7 East, 24.

(6) Abbott, 367.

(7) Liv. 3. tit. 8. Du Jet, art. 13. Abbott, 368.

(8) So proved in *Myer v. Vander Deyl*, Guildhall, Dec. 1803; and see Abbott, 368.

obstruct the management of the vessel; and except in cases where usage may have sanctioned the practice, the master ought not to stow them there, without the consent of the merchant freighter.

It is not necessary that the safety occasioned by a loss should, in order to form a subject of general average, be an absolute and perfect safety, by arrival and delivery at the port of destination. It is sufficient if temporary safety be obtained by the loss; thus if a ship survive a storm, or escape the enemy, by reason of any loss for the benefit of the whole concern, and the ship be afterwards cast away by another tempest, and goods be saved from the wreck, the clear value of the goods so saved must be contributory to the general loss, because without that original loss even this diminished value would have no existence. (1)

The abandonment of the thing cast away or lost on these occasions, for the benefit of the whole concern, is not to be considered so far voluntary as to divest the property of the owner, and give a title to any person who may find and save the same, but from such a person the owner may reclaim it, on payment of salvage (2); and if he is able to do so, its clear value is to be deducted from the contribution, or paid to the contributors.

All merchandize conveyed in the ship for the purposes of traffic, whether belonging to merchants, to passengers, to the owner, or to the master, of whatever kind, and however small be their weight in comparison to their value, must contribute to general average (3); for the contribution is made, not on account of incumbrance to the ship, but of safety obtained; therefore in this country bullion and jewels contribute according to their full value; but neither the passengers or crew are to contribute for their personal safety (4); neither in this country do the wearing apparel, jewels, or other things belonging to the persons of passengers or crew, and taken on board for their private use, and not for traffic, contribute on these occasions. (5)

What is bound to contribute to general average, and of the mode of contribution.

(1) Dig. 14. 2. 4. 1. Abbott, 367.

(3) Abbott, 368.

(4) Dig. 14. 2. 2. 2.

(2) Dig. 14. 2. 2. 8. & 14. 2. 8. See 2 Rob. Rep. 498.

(5) Abbott, 369.

Both the ship and the freight (1) gained in the voyage are now contributory, though in some countries contribution was made for the value only. Where a ship is chartered out and home, and the freight is payable on every ton brought home, the freight is contributory to a general average arising on the outward voyage (2). But the owners do not contribute for the victuals or ammunition of the ship. In France, and many other of the continental states, contribution is made in some cases for the whole, in others for a moiety only of the value of the ship, and of the gross freight. In this country, the owners contribute according to the value of the ship at the end of the voyage, and the clear account of the freight or earnings, after deducting the wages of the crew, and other expences of the voyage. (3)

It is a maxim of the law of England, that the lenders upon bottomry and respondentia shall neither contribute to average or salvage; the reason is, that they stipulate for a sum certain, and under the sole contingency of the arrival of the ship and cargo at the port of destination. It is not an understood condition between the parties, that the quantum of the sum lent shall be subject to any diminution short of a total loss. Lenders upon this security have no property in the ship or goods, and do not therefore fall within any of the principles of general average. (4)

The mariners do not contribute for their wages, except in the single instance of the ransom of the ship; in this instance they are required to contribute, in order to encourage resistance; in other instances they are exempted from contribution, lest the apprehension of personal loss should restrain them from the execution of the measures necessary to general safety, and the peril and extraordinary hardships endured by them on these disastrous occasions well entitle them to an exemption from further distress. (5)

By the civil law, the goods cast overboard were valued only at their invoice price, or prime cost; a practice formerly prevailed in this country to adopt this valuation, if the loss hap-

(1) 2 T. R. 408. As to the principle upon which freight is to contribute, see 4 M. & S. 155.

(2) 1 M. & S. 318.

(3) Abbott, 369.

(4) See 1 Holt on Ship. 423. 2 id. 201.

(5) Abbott, 370.

pened before half the voyage was performed, but if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination (1); and this practice still exists in many places abroad; but here the last valuation is adopted in all cases, where the average is adjusted after the ship's arrival at the place of destination, and appears best to agree with the nature of the subject; for although, as between the proprietor and the insurer of goods, the prime cost is the only value, the contract of insurance in that case being a contract of indemnity against loss, and not a contract for the security of gain, yet in this case equity requires that the person whose loss has procured the arrival of the ship at the place of destination, should be placed in the same situation with those whose property has arrived at that place, which can only be done by considering his goods as having arrived there also; but if the ship, in consequence of any misfortune to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted, in this case the goods only contribute according to the invoice price, for the price of sale is unknown; and with regard to the loss of masts, cables, and other furniture of the ship, as the new articles purchased will in general be of greater value than the articles lost, it is usual to compound the difference, by deducting one-third from the price of the new articles. Supposing therefore a general average to be settled upon the ship's arrival at the port of destination, according to the principles before advanced, it is necessary, in the first place, to take an account of the several losses which are to be made good by contribution; in which must be included the value of the goods, &c. thrown overboard, for otherwise the proprietors of those goods will receive their full value, and pay nothing towards the loss. (2)

In the assessments of the several shares of the parties to general average, the proportion is usually fixed by accountants by the civil law; the captain, as the representative of the owners, and in a degree of the freighters collectively, was empowered to settle the several proportions to a general average, and to receive

(1) Malyne, 113. Molloy, book 2. ch. 6. s. 6. Wellwood, tit. 21. by example, ably simplifies the manner in which the estimation for the contribution should be

Abbott, 370. reckoned.
(2) See Abbott on Shipping, 370, 371, 372., where the author,

the sums from each. The same rule prevails in some foreign countries; but in England the practice is for the broker or ship agent to make a settlement of the average; which settlement, however, is not conclusive, although, (when the principle of contribution is not disputed) according to the forms of business, it is usually paid. (1)

Of the remedies
for.

The master is not bound to part with the cargo or goods, until the contribution for general average is paid or settled by the owner thereof (2); in the case of a general ship, the master usually parts with them, on taking a security for the payment of any general average which may have arisen, and after the same shall be adjusted (3). A party who is entitled to general average contribution cannot restrain the master from parting with goods liable to make contribution until the contribution be paid (4). General average may be recovered at law by action of assumpsit, wherein each party must in general sue separately (5); but the parties entitled to it may proceed in equity, which course of proceeding is frequently advisable, if the account is very complicated; and in equity all the parties may join. (6)

Small average.

3. The *small averages* are the expences of towing and piloting the ship out of or into harbours, creeks, or rivers, beaconage, &c., one third of which must be charged to the ship, and two thirds to the cargo. This may in general be considered to be the meaning of the word "average," which is usually expressed in a bill of lading, where it stipulates for the delivery of the goods "with primage and average" accustomed. The law relating to primage will be here applicable.

IX. Salvage.

Salvage is a compensation for the safety of the ship or cargo, payable to those by whose labour and courage they have been preserved from wreck, or recaptured; both average and salvage are incidental and extraordinary obligations, and only become due upon some occasions of loss by perils of the sea or war. (7)

(1) 2 Holt on Shipping, 200.

(2) Dig. 14. 2. Abbott on Shipping, 257.

(3) Abbott, 258.

(4) 18 Ves. 187.

(5) 1 East, 220.

(6) See 3 Campb. 480.

(7) It would be out of the prescribed limits of this work to point out in detail all the various decisions and statutes relating to this subject. They are for the most part to be found in Abbott on Shipping, 406, &c., Holt on Shipping, vol. 2.

If a person save goods upon the sea, the common law allows him to retain possession, till the owner shall pay him a due compensation for his trouble, but this right of lien exists only in case of salvage strictly so termed, and does not extend to property saved on a river or on shore (1). If a ship be cast on shore, and the master, his crew, or any persons employed by them, are at hand to save and take care of the property, the lord of the manor cannot entitle himself to salvage, by interposing to secure it contrary to the owner's express dissent (2); and if one set of persons have taken possession of a vessel abandoned at sea, and are endeavouring to bring it into port and save it, another set have no right to interfere with them, and become participators in the salvage, unless it appears that the first would not have been able to effect their purpose without the aid of the others (3). Where persons claim as joint salvors, having dispossessed the original salvors, it is incumbent on them to shew, if not an actual, at least an apparent necessity for their intrusion. Merchants ought not to be charged with a higher rate of salvage, on account of an unnecessary interference of such second salvors; and when such intrusion was not

page 230, and Messrs. Tyrwhitt and Tyndale's Digest of the Statutes. The last act on this subject now in force is the 1 & 2 Geo. 4. c. 75., and the other acts in general are the 12 Ann. st. 2. c. 18., 4 Geo. 1. c. 12., 26 Geo. 2. c. 19., 48 Geo. 3. c. 130., 49 Geo. 3. c. 122., and 53 Geo. 3. c. 87. The acts for collecting contributions for the use of shipwrecked mariners in the kingdom of Portugal, 8 Geo. 1. c. 17., 54 Geo. 3. c. 126; in the ports of St. Mary and Cadiz in Spain, 9 Geo. 2. c. 25.; in the port of Leghorn, 10 Geo. 2. c. 14. In the case of salvage from perils of the sea, the statutes have not taken away the common law remedy, see Abbott, 331., 3 Bos. & Pul. 612.; but in the case of recapture, as the admiralty has peculiar jurisdiction over prizes, (see Dougl. 594, &c.) the 33 Geo. 3. c. 66. s. 42. renders it necessary

for the recaptor to resort to that court. See also 53 Geo. 3. c. 87. s. 6., 1 & 2 Geo. 4. c. 75. s. 21. As to cases upon the subject of salvage, in the case of capture and recapture, see 2 Burr. 694. 1 Rob. 177. 286. 5 Rob. 54. 215. 1 Edw. 66. 79. 115. 185. 265. 6 Rob. 108. 273. 275. 320. 410. 3 Rob. 305. 308. 323. 4 Rob. 78. 147. 268. Dod. 46. 192. 448. As to cases upon salvage where the recapture is joint, see Edw. 63. 268. 270. Dod. 9. 20. 33. 66. 349. 363. 372. where there has been a rescue, 1 Rob. 279. 3 Rob. 292. Edw. 185., where there has been a recapture by military force, Edw. 210. 211. 215. 254. 260. Dod. 117. 214. 223.

(1) 1 Lord Raym. 393. 8 East, 57. 2 Hen. Bla. 254. 1 Saund. 265.

(2) 2 Taunt. 302.

(3) 1 Edw. Ad. Rep. 175.

warranted by law, and no necessity shewn, the Court of Admiralty held, that they were not entitled to any reward for services they might have actually performed. The rule adopted by this court, in order to hold out sufficient encouragement, is to give liberally when the property is large, and when the property is small, according to the danger. In a case therefore, where the merits of the salvors were very considerable, the Court of Admiralty decreed one-tenth, as well as payment of the expences of the salvors (1). As respects crews and passengers, they can in no case be either salvors or joint salvors; the crew cannot have any claim to salvage, because it is their duty to protect the ship and cargo through all perils, and the whole of their possible service is pledged to the master and owners. The same reason extends in a great degree to passengers, who share the peril, and must share the duty; but if a passenger exceed what may fairly and reasonably be expected of him as his portion of common labour, to a common peril, and its consequences; if in the hour of danger, for example, he assume the command of a ship abandoned to him by the master and crew, and by his skill and labour bring her safely into port, he will be entitled to a reward in the nature of salvage, and the court will award it liberally (2). In the case to which we here allude, the passenger had been himself a naval captain, and took the command of the vessel at the special instance of the master and crew, under circumstances of extreme danger; he succeeded in bringing the vessel into port; the owner offered him £200 for this service, but the court and jury afterwards gave him £400.

The rate of salvage on derelict is discretionary by modern practice in the court; the ancient rule, of giving a moiety *de jure* to the finder, is overruled by later practice. By the French law, one third is given; by our own law, as administered in the Court of Admiralty, the reward is apportioned to all the circumstances of the case (3). The Court of Admiralty, as we have before said, has a special jurisdiction over the subject where the salvage is performed at sea. In this case the court will fix the sum to be paid, adjust the proportion, and take care of the

(1) Dod. 414.

(2) 3 Bos. & Pul. 612.

(3) 1 Rob. 37.

property pending the suit; or, if a sale be necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason (1). As to the persons who are to contribute to salvage, the reward must be paid by those who receive the benefit of the service. Salvage is a compensation to the salvors, not merely for the restitution of the property which has been made by them, to the prior owners, (for that is properly an act of mere justice on their part), but for the risk and hazard incurred by the salvors, and for the beneficial service they have rendered the former owners, in rescuing their property from the danger in which it was involved. The persons, therefore, to contribute to salvage, are the persons who would have borne the loss had there been no such rescue, and who of course reap the benefit of such rescue (2). The court will not suffer salvage to be confounded with mere acts of pilotage (3). But in cases of ships in distress, the Admiralty court gives a liberal allowance, and where it is not restrained by any positive enactment, will take all the circumstances into its consideration, such as the labour and peril of the service, the promptitude and alacrity of the salvors, the value of the ship and cargo, and the degree of danger from which they have been rescued (4). Thus, where the distress was great, the value of the property recovered £17,600, and the salvors numerous, £1,300 was given (5). In a case of distress, where the service rendered was small, the court deemed £50 to be sufficient (6). In a case of derelict, where the danger was inconsiderable, the court gave two-fifths. In another case, where the enemy abandoned a prize ship after capture, the court allowed the recaptors one-sixth, as for recapture of a derelict (7). In another case, where the service was attended with great danger, the court gave two-thirds of the whole value, a sum greater than the amount for which the action was first instituted (8). The freight will be included in the value of the property upon which salvage is given, in cases only where the voyage has been actually commenced, and the freight is in the course of being earned. (9)

(1) 3 Rob. 355.

(2) See 4 M. & S. 152.

(3) 1 Rob. 306.

(4) 1 Rob. 312.

(5) 3 Rob. 355.

(6) 4 Rob. 103.

(7) 4 Rob. 193. 216.

(8) 5 Rob. 322.

(9) 6 Rob. 88.

Salvage is not limited by the prize acts, where a ship has been voluntarily abandoned by the enemy, and in one case a moiety was given (1); where a ship has been rescued from the damages of the sea, as well as the hands of the enemy, the court will go beyond the proportion limited by the act of parliament, and give an additional reward for civil salvage, as for a separate service. (2)

(1) Edw. 79.

(2) Dod. 317.

CHAP. X.

Of Policies of Insurance. (1)

HAVING in the preceding chapters considered the contracts of manufactures and purchase, and those relating to the conveyance of the commodity from the vendor to the purchaser, we will now examine the contract of *insurance*, or indemnification against the consequences of a loss which may ensue to the merchant in the course of such conveyance. We have seen that the shipowner or master is not absolutely, and at all events, responsible for the safe arrival of the cargo at the port of destination; that he is not liable for losses attributable to what is vulgarly called the act of God or the perils of the *seas*, a term which we have seen has been liberally construed to extend not only to losses by storms, and other accidents merely of the seas, but also to captures. These losses, therefore, the owner must himself bear, unless he can prevail on others to take upon themselves those risks; and even in those cases, where the owner of the ship might be liable for the loss, the owner of the property may think it prudent to have a better security against the consequence of such loss.

Insurance is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event; the party who takes upon himself the risk, is called the *insurer*, sometimes the underwriter, from his subscribing his name at the foot of the policy; the party protected by the insurance is called the *insured*: the sum paid to the insurer as the price of the risk is called the *premium*, and the written instrument in which the contract is set forth and reduced into form is called a *policy of insurance* (2). The nature of this

Definition.

(1) See Park on Insurance, (2) The statute 35 Geo. 3. Marshal on Insurance, Selwyn c. 63. s. 11., directs that it shall N. P. tit. Insurance; Montefiore's be so called. Dict. tit. Insurance.

contract is throughout a contract of indemnity, and this principle ought always to be kept in view, in considering questions relative to insurance. (1)

Utility of.

It has been well observed, that the utility of this contract consists in the protection it affords to maritime commerce, by dividing losses when they happen between many, so as to make them fall lightly upon *each*, and thus enables individuals to embark their whole capitals in hazardous enterprizes. Without insurance, foreign commerce could only be carried on by the few who are wealthy enough or bold enough to run alone the risks which necessarily attend the prosecution of it: these would engross all maritime commerce to themselves, and their profits, for want of competition, would be immoderately high. The utility of marine insurances cannot be better expressed than in the words of the preamble to the stat. 43 Eliz. c. 12., which recites, that “by means of policies of insurance, it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allowed to venture more willingly and more fully.” The commercial character of this country was greatly raised by Lord Mansfield, who, by his liberal decisions on the subject of insurance, expanded the natural character of English courts of justice for impartiality, and thereby induced foreigners to resort to this country for the purpose of insuring their property from loss by water carriage; and we find, that owing to the wise and impartial administration of the law on the subject of insurance, the apprehension of the most calamitous losses in the course of commercial transactions, has introduced a mode of employing a part of the capital of this country greatly conducive to national wealth; and by insurers taking upon themselves in small proportion amongst each other, in consideration of a moderate premium, the risk which the merchant would otherwise bear, he is induced to carry on commerce with spirit, and without the apprehension of ruin in the event of loss; and the insurer by thus employing his capital and time in effecting a variety of insurances against different risks, so proportions the entire risk which he incurs, that in case of a loss of one or more particular cargoes,

(1) 9 East, 81. * 10 East, 344. Dougl. 470. 786.

the premiums which he has received for the insurance of those which safely arrived are in general more than equal to his proportion of the loss, and he is consequently enabled to reimburse the merchant, and also to derive a considerable profit; and in the case of insurance upon foreign property, this country is gainer by the difference between the aggregate amount of the premiums received from foreigners, and the losses which our underwriters may have to make good to them: thus from the apprehension of calamities which would otherwise be the ruin of individuals, all parties are by the contract of insurance in general benefited, and the wealth of our country in particular is increased. It would be impracticable, in a work of this nature, to enter into the consideration of all the minute decisions relative to the subject of insurance: our object on the present occasion will rather be to endeavour to afford a concise view of the leading principles and rules.

Utility of.

We will first consider who may be *parties* to the contract of insurance. In this country all persons, whether British subjects or allies, may in general be insured, and the principal, if not the only exception to this rule, is the case of an alien enemy, who cannot be a party to an insurance (1); and an alien enemy cannot maintain an action on a policy on goods though they were shipped before the war commenced, nor can an agent of such insured maintain the action, although he be a creditor of the insured for more than the sum insured (2). And no action can be maintained on a policy on the property of any alien enemy, though *British* manufacture exported from hence, and consequently favourable in a commercial point of view to this country (3). All trading with an enemy by a British subject without the king's licence is illegal, and consequently, any insurance in furtherance of such commerce is invalid; and where an insurance having been made on goods at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the com-

Who may be Parties to.

(1) 1 Bos. & P. 345. 6 T. R. 65. 8 T. R. 548. 3 Camp. 153. If a policy be not illegal on the face of it, the court will not grant a new trial to let in the defendant, to shew by evidence, that the insurance was upon a trading with the enemy. 1 T. R. 84. When aliens are protected by licence to trade, see ante, 1 vol. Index, tit. License. See also statutes 33 Geo. 3. c. 27. s. 4. 34 Geo. 3. c. 79. s. 17.

(2) 6 T. R. 65.

(3) 8 T. R. 548.

Who may be
parties to.

commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed, and been seized and confiscated, it was held, that the policy was void in its inception, though the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of hostilities (1). But where a ship belonging to an alien enemy is protected by the king's licence, an insurance may be effected on such ship by a British subject as trustee on behalf of the ship-owner, and an action on the policy may be maintained at the suit of the trustee even in time of war, because the public policy of the country is not contravened by sustaining and giving effect to such trust; and although the king's licence cannot in point of law have the effect of removing the personal disability of the ship-owner (being an alien enemy) in respect of suit, so as to enable him to sue in his own name, yet it relieves the trust in respect of him, from all the injurious qualities in regard to the public (2). An English subject who carries on trade under the protection and for the benefit of an hostile state, and who is so far a merchant settled in the state, that his goods would be liable to confiscation in a court of prize, is not to be considered as entitled to sue as an English subject in an English court of justice. Residing under the allegiance and protection of an hostile state, he may be considered to all civil purposes as much an alien enemy as if he were born there; but if he reside in a neutral country, he is entitled to all the privileges of a neutral country. (3)

Upon the question of expediency, whether or not alien enemies might be parties to an insurance, it may be observed, that though in general the effecting of policies on alien's property is conducive to the wealth of this country, this probably is so only whilst the countries are in a state of peace; and during war the naval superiority of Great Britain will probably occasion losses to the enemy greater than the premiums received by our underwriters; so that, upon the question of profit, the permission of insurances upon enemy's property would probably be injurious to British underwriters; but independently of this consideration, there are strong political reasons against such insurances. The object of war is to ruin the commerce and means of resistance of the adverse power; but if with one hand we should by

(1) 12 East, 225.

(2) 8 East, 273. 15 East, 266. 449.

(3) 3 Bos. & P. 113. 7 Taunt.

our superior maritime strength capture the vessels and goods of our enemy, and with the other hand, through our underwriters, engage to make good the loss, the utility of our naval strength would be frustrated, and our enemy, being thus indemnified for the loss, would be enabled by ourselves to protract the contest; in addition to which, every person concerned in such insurances would be under strong temptation to convey to the enemy all such information as might put them upon their guard, at least against attacks meditated against their trade; it cannot, therefore, reasonably be supposed that our law will tolerate a contract which has so strong a tendency to betray a number of persons into a breach of their allegiance.

Who may be parties to.

An insurance, however, by a neutral, though domiciled in an enemy's country, and trading with the enemy, is perfectly legal (1). And if the trade with the enemy be rendered legal by a competent power, a contract in furtherance of such trade will be impliedly legalized; and therefore it has been decided (2), that a licence to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to H. N. on behalf of himself and other British merchants, is sufficient to legalize an insurance on such adventure, if it appear that H. N. was the agent employed by the British merchants really interested in it to get the licence, though he had no property in the goods himself.

There are but few observations to make as to the persons who may be insurers. With respect to individuals in general, any person may separately become an underwriter who is competent to contract on his own behalf; but in point of prudence, no person should engage in this description of contract unless he is well informed upon the nature of shipping, the description of the voyage, and degree of risk; and to constitute an able underwriter, the party should be well versed in the commerce of the world. At common law, any number of persons might become partners in an insurance transaction; but the legislature having thought fit to authorize the king to grant charters to the London Assurance and the Royal Exchange Assurance companies, enabling them to insure ships and goods at sea, it became necessary, and was enacted by 6 Geo. 1. c. 18., that these companies should have an

(1) 6 T. R. 413. 1 Camp. 75. (2) 12 East. 223. See also ante, 3 Taunt. 554. 1 vol. Index, tit. Licence.

Who may be parties to.

exclusive privilege of effecting insurance as partners. And the 12th section of the act prohibits all other corporations and partnerships from underwriting any policies or making any contracts for assurance of ships or merchandize at sea, or going to sea, or for lending money by way of bottomry; and since this regulation two or more persons cannot join in an insurance upon other persons property, and any agreement in furtherance of any such illegal stipulation is invalid. And therefore, where A. and B. were jointly engaged in insurances in the name only of A., and B. paid greater losses than he received premiums, and both became bankrupts, it was held that A.'s assignees could not recover from those of B. a moiety of the money thus advanced (1). It was contended on the part of plaintiffs, that the object of the statute was to prevent a competition between the insurance companies and any other *open and ostensible partnership* which might gain credit in opposition to the companies, but here *only one individual appeared*, on whose single security the insurance relied; but the court were unanimously of opinion that the nonsuit was right, for the provisions of the act would be at an end, if a person by insuring in his own name could have the benefit of a joint capital, which the act expressly prohibits, though the party subscribing shall be estopped from setting up a secret partnership to defeat an insurance. And an action cannot be maintained on a policy of insurance where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, though they are general partners in trade (2); but if merchants raise a joint fund, and underwrite each other's property severally, and provided each merchant be not liable for the whole, the insurance is legal, though losses be paid out of the joint fund (3). And a policy by a club of mutual underwriters, where the members are not responsible for the solvency of each other, is valid, although the sums which each member engages, depending on the amount for which he is insured, cannot be specified in the policy (4). Where an insurance is void as in derogation of the right of these insurance companies, the ostensible underwriter cannot on the ground that the partnership was illegal recover from the broker the profits of such partnership insurance (5); but though such contracts are void as be-

(1) 2 H. Bla. 379. 1 Taunt. 6.,
and see Aubert v. Maze. 2 Bos.
& Pul. 37. 1 Maule & Sel. 751.
(2) 2 Stark. 66.

(3) 2 Esp. 513. 1 Taunt. 6.
7 T. R. 340. n.
(4) 4 Camp. 166. 3 Burr. 1512.
(5) 6 T. R. 405.

tween the secret partners, they are not so as between the under-
writer and an innocent insured. (1)

Who may be
parties to.

We will now consider the subject matter of marine insurances, the points relating to which may be arranged under three heads; *first*, as to the matter or thing insured; *secondly*, the interest of the insurer therein; and *thirdly*, what risks may be insured against. With respect to the matter or thing, a policy may be effected on ship, freight, or goods, &c., but not upon any thing which militates against public policy, or against the provisions of a statute, or tends to give effect to an illegal contract. Thus an insurance on smuggled or prohibited goods, or on commerce with an enemy, or on contraband goods, or on any illegal voyage, is invalid (2). We have already considered the illegality of contracts relative to these points, and it is unnecessary here to enumerate them again; it may suffice to observe, that to all cases of illegal contract that may become the subject matter of insurance, our courts of justice deny effect; for though it has been observed (3), objections of this nature always come with an ill grace from an insurer who has accepted the premium and promised the indemnity, yet the courts are bound to allow the objection, not for the sake of the insurer, but in obedience to the law, which is founded on general principles of policy, and of which, by a sort of accident, the insurer is permitted to take advantage contrary to the real justice of the case as between him and the insured. (4)

Subject matter
of insurance.
1st, With re-
spect to the thing
insured.

Freight and passage money may be insured, either as to the whole or for a part of an entire voyage (5), but at the time of entering into the policy of insurance there must be an existing contract for such freight and passage money, and an inception of the risk of losing the same (6); but it is immaterial whether

(1) Montefiore's Dict. tit. Ins. Harrison v. Millar, at N. P. after Mich. T. 1796. 7 T. R. 340. n. Park. 11.

insurance, he may recover back the premium. 1 Stark. 254. 4 Camp. 470. 12 East, 325. 5 M. & S. 122.; otherwise he is not. 1 Taunt. 227.

(2) Aute, 1st volume, Index, tit. Insurance; ante, this volume, 78.

(5) 15 East, 324.

(3) Per Lord Mansfield, Cowp. 343.

(6) 2 Stra. 1251. 1 Campb. 520. 1 New. Rep. 23. 13 East,

(4) Where the insurance is effected without any fraudulent intent, and under expectation that the party is effecting a legal

323. 6 T. R. 478. 7 East, 400. 1 New. Rep. 236. 1 M. & S. 303. 1 Bos. & Pul. 636.

Subject matter
of.

the contract be under seal or not, or whether it be written or verbal. And in a case where a ship was a seeking ship, and was to complete its lading at different places, having got part of her cargo on board, she was lost by a hurricane in the West Indies, in endeavouring to pass from one port to another to complete her cargo; and the plaintiff claimed to recover insurance on freight for that part of the cargo which was not loaded at the time of the loss, as well as for that which had been put on board, and he gave in evidence a number of letters from the owners of plantations in Jamaica, and other persons, expressing their intention of sending sugars and other goods on board, and the jury thought he was entitled to recover as for a full cargo; here there was no complete or definite contract for any specific freight, but it was paid according to the usual terms in the particular trade (1). Slight circumstances will constitute an inception of the risk, such as putting part of the goods on board (2), or preparing the vessel for the goods, or the passengers, or any commencement of the voyage; but such inception of risk must in general depend upon the particular circumstances of each case, and no general rule can be well laid down to say what will amount to it. Where the owner of a vessel had entered into a contract with the East India company at Madras, through the medium of a correspondence with their agents, for freight and the passage of invalids, and the ship had been surveyed by their officer, and represented to be fit for the purpose after certain alterations had been made, and goods had been shipped, water taken in for the invalids, and the projected alterations commenced, but the completion prevented by the perils of the sea, it was held in an action on a policy on freight and passage money, that there was an inception of the risk, and that the plaintiff was entitled to recover the passage money as well as freight, and that the contract for such freight and passage money was sufficient to entitle the insured to recover on such policy (3); and where the ship was to sail to a distant place, there to take in her cargo, it was held, the risk commenced on the freight from the time of her sailing for that place (4). An insurance on the "*commission privileges, &c.*" of

(1) Parke v. Hebson, K. B. 520. 1 New Rep. 23. 13 East, M. Term 1816, not reported. See 323.
5 Moore Rep. 41. 2 Brod & B. (3) 5 Moore, 33. 2 Brod. & 326. And see 6 Term Rep. 478. B. 320. S. C.

(2) 2 Stra. 1251. 1 Campb. (4) 6 T. R. 478.

the captain of a ship in the African trade is legal (1). A sailor cannot insure his *wages*, nor any thing that he is to receive at the end of the voyage in lieu of wages, nor can he recover the value of such thing in an action against his agent for negligence in not procuring such insurance (2); but where with wages actually acquired he has purchased goods in a foreign country, he is allowed to insure them, as the restraint is meant only to apply to such wages as are not due till the voyage is *entirely finished*. The same policy which precludes seamen from insuring their wages, seems also to prevail against the insurance of wages of the captain, though if he be a part owner he may insure goods which he may have on board, or his share in the ship.

Subject matter
of.

The *profits* expected to arise from a cargo of goods may be insured (3); so the profits of a cargo employed in trade on the coast of Africa are an insurable interest (4); so an insurance on imaginary profits from B. to H. (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at H., if it arrived safe) was holden good (5). In all these cases, it must appear that some profit would have arisen had not the peril happened (6). Property purchased with the proceeds of an illegal cargo is insurable (7). Property liable to a seizure for an act already done is insurable. (8)

We have next to consider the interest of the party in the property insured. Insurance is a contract of indemnity from loss or damage (9) arising from an uncertain event: the object of insurance, strictly speaking, is not to make a positive gain, but to avert a possible loss. A man cannot properly be said to be indemnified against a loss which can never happen to him; there cannot be an indemnity without a loss, nor a loss without an interest. A policy therefore without interest is not an insurance, but a mere wager. The insurer therefore must have an interest in the property insured, but he need not be so interested

2d. Interest of
the assured.

(1) 2 New Rep. 206.

(2) 7 T. R. 157. 3 Burr. 1904.

(3) 6 T. R. 483. n. 3 Bos. & Pul. 85. n.

(4) 2 East, 544.

(5) 2 East, 549. n.

(6) 6 East, 316.

(7) 8 T. R. 562.

(8) Id.

(9) Dougl. 470. 786.

Subject matter
of,

when the policy is made; and it will be sufficient if he was interested at the time the risk commenced. (1)

It would be extremely difficult to give any accurate definition on insurable interest; it may be considered however that, provided the object of the contract be not a wager, the least qualified property in the thing insured, or any reasonable expectation of profit, or well-founded expectation of a future interest in the thing insured, will constitute that sort of interest which the party may legally protect by insurance; and even an equitable interest is insurable (2). Still, however, an insurable interest must be founded on some legal or equitable title; and though a person may have a sort of claim, which as between him and the legal owner might be thought reasonable, and such as the legal owner could not conscientiously dispute, yet if this claim be inconsistent with the title which the law can recognize, it will not be deemed to be an equitable title, and therefore not an insurable interest (3). Trustees, having the disposal of ships and goods according to the directions they may receive from third persons, may insure (4). Commissioners authorized by statute to take into their care all Dutch ships, &c. detained in British ports, and to dispose thereof according to the directions from the privy counsel, may insure in their own names such ships, after seizure at sea, and while they are on the passage to England (5). A trustee, a consignee, or an agent for prizes may insure the prize: a mere cestuique trust of goods without any legal title may insure (6). A general agent to whom a consignment devolves in consequence of the consignees refusal to take the goods, may insure them as agent for the consignor, or in his own right, if he accepted bills on account of them. If a merchant abroad, in order to secure the payment of a *debt* due to his correspondent in England, mortgage to him his interest in certain goods of freight, the correspondent, after the mortgage becomes absolute, may insure the legal interest on account of the mortgagor (7). A creditor has an insurable interest in goods consigned by the debtor of his own accord to a third person in trust for the creditor; and therefore, where A. being

(1) 2 Taunt. 237. 2 Bos. & Peake, 151. 8 T. R. 23.
 Pul. 153. 155. (5) 8 T. R. 13. 3 Bos. & Pul.
 (2) 2 T. R. 187. 75.
 (3) 5 T. R. 709. (6) 1 Bos. & Pul. 315.
 (4) Montefiore, tit. Ins. See (7) 2 T. R. 188.

indebted to B., without any order from him consigns goods to C. to be held for B., and indorses the bill of lading to C., B. has an insurable interest in the goods so consigned (1). A debt which arises in consequence of the article insured, and which would have given a lien upon it, gives an insurable interest *pro tanto* (2). Where a bill of lading is indorsed and delivered, but the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, an insurance made on account of the indorser after such indorsement is good (3). Freight can only be due from the legal owner of the ship, therefore he alone can insure it; and a party cannot insure a hope or expectation, not having any interest in the subject insured (4). Freight is not insurable by the freighter of the ship (5). No person can have either a legal or equitable title to a ship, unless he be named in the register (6). The chance of a grant from the crown gives no right to insure the subject matter (7). The lender upon bottomry and respondentia bonds has an insurable interest for the sums lent; the owner of the ship or goods has an insurable interest in the surplus value above the sum lent, but the usage of trade may take a case out of this rule upon an insurance upon goods, specie, and effects. In the India trade, the insured may recover for money laid out for the use of the ship, and for which he charged respondentia interest, it being the usage of the trade to insure in this form (8). Captors of a ship seized as prize may insure their interest therein (9); a prize taken by the navy and army conjointly is insurable on account of the interest of the captors, under the statute 45 Geo. 3. c. 72. s. 3., which grants prize so taken to the conjoint captors, after condemnation, subject only to the apportionment of the crown, as to the respective shares (10). Receiving payments as for a total loss or capture does not preclude the assured suing and labouring to obtain restitution, who therefore may insure any interest thereby acquired in the subject matter (11); being a case in which the assured was held to have an insurable interest, as upon a hotchpotch right,

Subject matter
of.

(1) 1 Bos. & Pul. 315.

(2) 1 Bos. & Pul. 316.

(3) 1 T. R. 745.

(4) 5 T. R. 709.

(5) Dougl. 539.

(6) 3 T. R. 400. 5 T. R. 709.

(7) 11 East, 428.

(8) Gregory v. Christie, K. B.

T. T. 24 Geo. 3. Park. on Ins. 7 ed.
14.

(9) 8 T. R. 154.

(10) 11 East, 619. 2 Campb.
225. S. C. 13 East. 297.

(11) 14 East, 522.

Subject matter
of.

and also as representing one, the common agent of all concerned. An alien in possession as owner of a vessel belonging to this country has an insurable interest, whether or not the lawful owner. (1)

Wager Policies
and valued Policies.

With respect to *wager policies* the courts have observed, that many are the contrivances which men have fallen upon for the gratification of their propensity for gaming; and the uncertain events of maritime adventure afford an obvious and extensive field for the calculation of chances, and the decision of fortune. The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention, and withdraws the exertions of men from useful pursuit. By pointing out a speedy, though hazardous mode of accumulating wealth, it produces a contempt for the moderate but certain profit of sober industry; it prevents the activity of the mind, taints the heart, and depraves the affections, by frequent and great reverses of fortune; it not only becomes the source of great private misery, but suggests constant temptation to fraud and the perpetration of atrocious crimes. There are few well regulated governments in which gaming has not been laid under considerable restrictions. In this country ideas less rigid have prevailed: innocent wagers have long had the sanction of common law; they are only deemed illegal where they are prohibited by statute (2), or where they tend to create an improper influence on the mind in the exercise of a public duty (3), or where they are *contra bonos mores*, or in any other manner tend to the prejudice of the public, or the injury of third persons (4); and, after all, it must be owned that the law greatly descends from its dignity when it lends its aid to give effect to any wager, however innocent. At common law a wager policy was lawful (5), but this is now otherwise, as by the statute 19 Geo. 3. c. 37. it is enacted, "that no insurance shall be made on any ship or ships belonging to his majesty or any of his subjects, or any goods or effects laden on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurers, that every such insurance shall be void." But by s. 2. it is provided, that insurances on private

(1) 2 Taunt. 237.

(2) 6 T. R. 499.

(3) 1 T. R. 458.

(4) See ante, 78. to 99.

(5) 3 Taunt. 515. 8. T. R. 13.

ships of war, fitted out by any of his majesty's subjects solely to cruise against his enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the insurer. And by s. 3. it is also provided, "That any effects, from any port or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be insured in the same manner as if this act had not been made." By s. 5. "All sums of money lent on bottomry or respondentia, upon ships belonging to his majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects on board, or to be laden on board, and shall be so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make insurance on the money so lent, and the borrower shall recover no more on any insurance than the value of his interest in the ship, or in the goods on board, exclusive of the money so borrowed; and in case it shall appear that the value of his share in the ship or in the goods on board doth not amount to the sum borrowed, he shall be responsible to the lender for so much of the money borrowed, as he hath not laid out in the ship or goods on board, with interest for the same, together with the insurance, and all other charges thereon, in the proportion which the money not laid out shall bear to the whole lent, notwithstanding the ship and goods be totally lost." And by s. 6. "In all actions brought by the insured, the plaintiff or his attorney or agent shall, within fifteen days after he shall be required so to do in writing by the defendant or his attorney or agent, declare in writing what sum or sums he hath insured or caused to be insured in the whole, and what sums he hath borrowed at respondentia or bottomry for the voyage or any part of the voyage in question."

Subject matter
of.

The regulations and restrictions of this statute being confined to insurances on ships belonging to his majesty and his subjects, and to goods and effects laden therein, insurances upon the ship and goods of foreigners are not within the act, but remain the same as before the passing of the act (1). In wager policies, the insured takes upon himself to perform all that the owner could have done. An insurance cannot be made on one thing, to de-

(1) Dougl. 304, 8 T. R. 13.

Subject matter of. pend upon the fate of another, if the subject matter of the insurance be unconnected with the event insured against. (1)

A wagering policy, and a policy on interest, are contracts distinct in their nature and incidents (2). Therefore a *valued policy* of insurance, that is, a policy stating on the face of it (3) the sum which the insured has at stake in the property, is not in general to be considered as a wager policy. A policy, therefore, "without further proof of interest than the policy," is good within the act (4). A valued policy on profits expected upon a voyage is not within the act, the object of the insurance being an indemnity (5); so a valued policy on a commission expected, as a consignee of a cargo, is not a wager (6). A small interest, however, and where the intent of the parties has evidently been to enter into a wager policy, will not take a case out of this statute: thus an agreement in consideration of £20 to pay £100 if a ship did not save her passage to China, was held a wager policy within the act, though the party had some goods on board (7). In a valued policy, the proper effect of the valuation is the fixing the amount of the prime cost, in the same manner as if the parties had admitted it at a trial; but for every other purpose it must be taken that the value was fixed in such a manner as that the insured meant to have an indemnity and no more. The courts will not, in a valued policy, inquire very minutely whether the valuation be very near the true interest of the insured (8). The practice of permitting the insured on a valued policy to recover the whole sum insured upon a total loss, though his interest be less than that sum, is against this statute. (9)

Re-assurance. A policy of insurance being once signed, the underwriters are bound by the terms of it, nor can they be released, unless by consent of the parties (10). In the most parts of Europe, the

(1) 1 T. R. 304.

(2) 3 Taunt. 513.

(3) Id. 1 T. R. 301.

(4) 4 Burr. 1966. 1 Marsh. on Insurance, 84.

(5) *Grant v. Parkinson*, M. 22 Geo. 3. B. R. MS. Park on Insurance, 402.

(6) *Flint v. Le Mesurier*, at N. P. after H. T. 1796. Park on

Ins. 7 ed. 403.

(7) Cowp. 583.

(8) 1 Marsh. 84.

(9) *Montefiore*, tit. Insurance, 4 Burr. 1966.

(10) See ante, 140, 148. As to the effect of an alteration with regard to the stamp, ante, 178. to 181.

underwriter may shift it, or part of it, from himself to insurers, by causing a re-insurance to be made on the same risk, and the new insurers will be responsible to him in the case of loss to the amount of the re-insurance, but the re-insurer is only responsible to the original insurer, and not to the insured. In England, however, this is prevented by the 19th Geo. 2. c. 37. s. 4., which prohibits re-insurances, except in the case of the insolvency, bankruptcy, or death of the original insurer; but then the policy can only be made to a certain amount, and by certain persons, and must express itself to be a re-assurance (1). This statute has been held to extend not only to British but to foreign ships (2). If an underwriter transfers by parol to another, at a higher premium, his subscription to a policy, it is not such a re-assurance as is prohibited by this act. (3)

Subject matter
of.

Double insurance is where the insured makes two insurances on the same risk and the same interest. A double insurance, though it may be made with a view to a double satisfaction in case of loss, and is, therefore, in the nature of a wager, is not void. The two policies are considered as making but one insurance; they are good to the extent of the value of the effects put in risk, but the insured shall not be permitted to recover a double satisfaction. He may sue the underwriter on both the policies, but he can only recover the real amount of his loss to the extent of what is insured, to which all the underwriters shall contribute in proportion to their several subscriptions, and, therefore, if he should content himself with suing only on one of the policies, the underwriters on that policy may recover a rateable contribution from those on the other (4). In an action on a valued policy, it is no defence that the assured have received the amount of this valuation from underwriters on another policy, if the subject insured be of a value equal to the sum received and that sought to be recovered (5). Though only a single satisfaction can be recovered on a double insurance by the same person, yet different persons may insure the same thing, and each recover the full value of the thing insured (6).

Double Insur-
ances.

(1) 19 Geo. 2. c. 37. s. 4.

Insurance, 7 ed. 424.

(2) 2 T. R. 161.

(5) 4 Camp. 228.

(3) 1 Taunt. 48.

(6) 1 Burr. 489. 1 Bla. 103.

(4) Davis v. Gildart, N. P. post Montefiore, tit. Insurance.
Easter T. 17 Geo. 3. Park on

Subject matter
of.

If the whole loss be recovered from one insurer, he ought to stand in the place of the insured, to receive contribution from the others. But various persons may insure various insurances on the same bottom. If a freighter covenants to pay the owner the full value of the ship if lost, the latter has still an insurable interest. (1)

3dly. What risks
may be insured
against.

With respect to the *risks* which may be insured against, they may be considered with reference to what risks may be *rarely* insured against, and what risks are *usually* insured against. *First*, Insurance may be made against all the risks or perils which are incident to sea voyages, subject, however, to certain exceptions founded in public policy and the interest of humanity, which require that in certain cases men shall not be permitted to protect themselves against some particular perils by insurance. Upon principles of natural justice, the insurer can in no case make himself answerable for any loss or damage proceeding *directly* from the fault of the insured, because no man can bind himself to another to be answerable for the fault of the latter. It was on this principle, we may recollect, that a carrier cannot legally make a contract indemnifying himself against his own personal misconduct (2). But it seems that the insurers may insure against the barratry or other wrongful act of any party not being immediately the party insured (3). Before the recent abolition of the slave trade, it was declared unlawful by the legislature to effect policies operating as an indemnity against the mortality of slaves by natural death or ill-treatment, or by throwing them overboard; and if, by unavoidable accidents, the voyage be prolonged beyond the usual time, whereby a scarcity of provisions ensues, and a number of slaves perish for want of proper food, they shall be considered as having died a natural death, though the original cause of this misfortune may be said to have arisen from the peril of the sea (4). *Secondly*, It may be advisable, perhaps, to consider the different risks that are insured against, when we inquire into the different parts of a policy in their natural order, and we will, therefore, now proceed to inquire into the form and contents of a policy of insur-

(1) 3 Camp. 93. Marsh. 146.
1 Bla. 416.; sed vide Pothier,
Traité du Contrat d'Assurance,
chap. 1. sec. 2. num. 33.

(2) See ante, 377. 378. 5 East,
428.

(3) See post, tit. Barratry, &c.

(4) 6 T. R. 526.

ance, and the general construction of that instrument throughout its parts.

Subject matter of.

A policy of insurance is generally printed with blanks, so that by writing it may be filled up and qualified according to the particular contract of the parties (1). In order to illustrate the nature of the policy, it will be proper to consider the essential parts of which it is composed, which are as follow:—
1st. The name of the party insured or his agent, and the description of his interest. 2d. The voyage insured. 3d. The subject matter of insurance. 4th. The name of the ship and master. 5th. The perils against which the insurer undertakes to indemnify the insured. 6th. Other usual contents of the policy. 7th. The memorandum. 8th. The date and execution. 9th. The stamp.

Form and construction of a Policy.

At the head of the policy, the name of the insurer, *his agent or trustee*, is to be written. By stat. 28 Geo. 3. c. 56. (2) it is enacted, “that no person shall effect any policy on any ship or goods, without first inserting the name or names, or the usual *stile and firm of dealing of one or more of the persons interested* (3), or of the consignor or consignor’s consignee of the property to be insured, or of the person or persons residing in Great Britain who shall receive the order for and effect such policy, or of *the person or persons* who shall give the order to the agent or agents immediately employed to negotiate or effect such policy; and every policy made contrary to the true intent and meaning of this act shall be null and void.” This statute in general receives a liberal construction (4); where the persons interested were denominated in the policy the trustees of Messrs. K. F.

1st. The name of the party insured, and of the description of his interest.

(1) The form generally used has always been considered as ill framed, 4 T. R. 210. 3 East, 578. Burr. 348. 1555. See forms of policies, post, 4 vol. See the Scotch form. Millar’s Elements of the Law relating to Insurances. The memorandum, or slip as it is termed, sometimes used preparatory to the contract, is invalid, and merely obligatory in honour. 11 Geo. 1. c. 30. s. 44. 3 Espin. R. 100.

(2) This statute repeals the 25 Geo. 3. c. 44.

(3) See 15 East, 4. where it was decided that a declaration stating that A. (the plaintiff) caused to be effected a policy, containing that B. made assurance, and averring the interest in C., with a promise by the defendant to the plaintiff, in consideration of the premium paid by the plaintiff, was sufficient after verdict.

(4) See 1 Bos. and P. 322.

Form and construction of.

and Co., it was thought that this might be considered as their usual style and firm of dealing for the purposes of this act (1). If the name of the broker effecting the policy be inserted in it, it is a sufficient compliance with this statute, though he be not described therein as agent. So, though it should appear the agent named in the policy be not the general agent, but only an agent for that particular purpose (2); and a general agent may insure without an order for that purpose, when it is to the interest of his correspondent that he should do so. (3)

The interest in a ship is in general, *primâ facie*, proved by acts of ownership (4), but the production of the register is conclusive as to this proof (5). A condemnation in the Admiralty is conclusive evidence of property in the captors of a vessel (6). The interest in goods is *primâ facie* proved by the production of the bill of lading, and by the testimony of the captain that he had the packages on board (7). The custom-house copy of the searcher's report produced by the officer in whose custody it is lodged, is evidence of the actual shipment of the goods therein specified. (8)

2d. The voyage insured.

The policy next proceeds to state the voyage. In ordinary policies the continuance of the risk on goods is generally expressed to be "*from the loading thereof on board the ship, and to continue until the same be discharged and safely landed*" at the port of delivery. Upon the ship on an outward voyage it is sometimes "*from her beginning to load*" at some particular place, or *at and from* such place; sometimes *from a particular day*. On a homeward voyage it is generally made to commence "*on the ship's arrival*" at a particular place abroad, or "*at and from*" such place, and continues "*till she arrives*" at her place of destination, "*and is there moored twenty-four hours in good safety.*" Certain provisions are often added, to enable the ship to touch, trade, stay and trade, &c. at certain places, out of the direct course of the voyage, or to sail after and capture

(1) Camp. 538. S. C. not S. P. S. P. 4 East. 136. 2 Esp. 617.
 Park. 299. n. and see 1 Chitty (5) 4 Esp. 98. S. P. 5 T.R.
 Rep. 49. 709, sed vid. 16 East, 167.
 (2) 1 Bos. and P. 346. n. 345. (6) 2 Camp. 225. 229.
 (3) 1 Bos. and P. 316. (7) 1 Esp. 373.
 (4) 1 Esp. 207. 5 Esp. 88. (8) 6 Esp. 47.

prizes, &c. without being guilty of a deviation (1). Sometimes privateers, and vessels which are constantly employed in the coasting trade, are insured for a term; but by the statute 35 G. 3. c. 63. s. 12. this term must not exceed twelve calendar months; if it exceed that time the policy will be void. The voyage insured must be truly and accurately described in the policy. (2) If there be any blanks in this respect, it may frequently invalidate the policy for uncertainty (3); and though the description of the voyage be literally true, yet, if it be calculated to induce a false conclusion, the policy will be void (4); and if there be any wilful misrepresentation or concealment of the intended voyage, or of any other material part, in the policy, it will be avoidable on that ground. (5) Upon an insurance on an East India voyage, the underwriters are bound to know the course of the East India Company's charterparties and trade, and that the ship's destination is liable to be changed after the policy is effected. (6) If the East India Company permit the voyage of a chartered ship to be altered, though it is at the request and partly for the benefit of the assured, the altered voyage continues protected by the policy. (7)

Form and construction of.

The place from whence the voyage and risk is to commence should be stated accurately, and the underwriter should always be acquainted, whether the insurance is to be at the commencement or in the middle of a voyage; and if the policy be made upon a ship or goods, as if the ship was about to commence her voyage, when in fact it was in the middle of her voyage, and such fact was not known to the underwriter, he will not be liable (8). If a policy describe a voyage, at and from a place, which is the head of a port, it will not cover a voyage at and from a distinct place, which is a member of the same port (9). Under a policy at and from Jamaica to London, the Court of Common Pleas held that a ship was protected in moving from port to port in that island (10). A policy of insurance "at and from Lyme to London," does not protect a cargo laden at Bridport within the port of Lyme, and nine miles nearer to Lon-

Place of departure.

(1) Montefiore, Dict. tit. In. see post. 7 T. R. 162.
insurance. (6) 1 Taunt. 463.

(2) Marsh. 227.

(7) 1 Taunt. 463.

(3) Id. Molloy, b. 2. c. 7. s. 14.

(8) 1 Bla. Rep. 463.

(4) 1 Bla. R. 463.

(9) 2 Taunt. 405. notâ.

(5) As to what should be communicated to the underwriter,

(10) 2 Taunt. 301.

Form and construction of.

don (1). If a policy be effected on goods, on a voyage defined from A. to B., the risk to commence "at and from the loading thereof on board," not saying where, it must be intended a loading at the place from which the voyage commenced (2). And if the proof be, that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured commences, the plaintiff cannot recover (3); though the same underwriter had insured the same goods for the anterior voyage, and knew the second policy was effected thereon (4). A policy of insurance on goods "at and from Gottenburgh to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburgh," will not cover goods previously loaded on board at Lõndon, which arrived in the ship at Gottenburgh (5). A policy at and from G. on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at G. (6) The plaintiff was held entitled to recover a loss of goods insured at and from Landscrona to Wolgart, though they were shipped at Gottenburgh before the ship arrived at Landscrona, and though the policy was declared to be at and from the loading of the goods on board the ship, it appearing that the underwriter was informed at the time that the goods were loaded on board at Gottenburgh, and that part of them were landed and reloaded at Landscrona, so as to enable the custom-house officers there to ascertain the qualities of the whole, and to adjust the duties, and the policy being free of average (7). Policy on goods at and from G. to any port in the Baltic, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy, which was a policy from V. to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, to return 12 per cent. if the voyage ended at G.; it was held, that the assured were entitled to recover, although the goods were not loaded on board at G. but at V., and although the defendant was not an underwriter on the former policy (8). Where a policy of insurance was on goods at and from Pernambuco to Maranham, and from

(1) 3 Taunt. 403.

(2) 2 Taunt. 416.

(3) Ibid.

(4) Ibid.

(5) 15 East, 46. 4 Taunt. 628.

(6) 4 Taunt. 628.

(7) 16 East, 176.

(8) 16 East, 240.

thence to Liverpool, beginning the adventure on the goods from the loading thereof on board the ship wheresoever; it was held that it would cover goods previously loaded at Liverpool, and which arrived at P., but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from P. to M. (1) Under a policy of insurance on goods at and from G. to the ship's port of discharge, beginning the adventure on the said goods from the lading thereof aboard the said ship; it was held that the policy did not cover goods loaded at an anterior port, though they were in a loaded state, and in good safety at G. just before effecting the insurance. (2)

Form and construction of.

Where by a policy of insurance, ship and goods were insured "at and from all and every port, &c. on the coast of Brazil, and after the 17th of September to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the said ship, at all or every port, &c. on the coast of Brazil, and from the 17th of September 1800; and upon the ship in the same manner," and with liberty to sail to, &c., any places backwards or forwards, under the Portuguese government, &c., at a premium of four guineas per cent., to return £3 10s. should the ship have arrived, or the risk have otherwise ceased on or before the 17th of September: it was held, that the policy only attached on the homeward bound cargo, laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape; neither did the policy cover the ship itself, which was insured in the same manner as the goods (3). An insurance was effected on freight, valued at £500 on a voyage at and from Demerara, Berbice, and the windward and leeward islands to London; and the ship being at Demerara, an agreement was entered into by the master with a house there, for the freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demerara to Berbice, and deliver them there; and while proceeding from Demerara to Berbice, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight; it was held that it was not a loss within

Description of voyage.

(1) 1 M. & S. 418.

(2) 2 M. & S. 106.

(3) 4 East, R. 150.

Form and construction of.

the policy (1). But under a policy of insurance, on goods from A. to B., C., and D., the risk was holden to attach where the ship, which was captured before the dividing point, sailed with intention to proceed directly to D., without first visiting the intermediate places; though under such a policy, if a ship mean to go to more than one of the places so named, she must visit them in the order in which they stand in the policy (2). A policy upon a homeward voyage from India, upon goods at and from a foreign port of lading, until the ship's arrival in London, beginning the adventure upon the said goods from the lading thereof at the foreign port, and so should continue upon the goods until the same should be discharged, was held to attach only on the particular cargo taken at the first port of lading (3); though the insurance was to all or any ports and places whatsoever beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, with liberty to proceed to touch and stay at any port or places whatsoever, for any purpose whatsoever (4). On a policy at and from Pernambuco, or any other port or ports in the Brazils to London, beginning the adventure from the loading the goods on board the ship, on the termination of her cruise, and preparing for her voyage to London; the ship, on the termination of her cruise, touched at Pernambuco, but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither; it was held that the policy attached at Pernambuco. (5)

Place of destination.

The port or ports of the ship's destination must be truly stated. Freight is insured from A. to B., but if the goods in truth are intended to be sent to C., the policy is void (6). A ship was insured from London to any port or ports in the river Plate, until her arrival at her last port of discharge in that river, and the master intending to discharge her cargo at Buenos Ayres, passed Maldonado, but hearing that Buenos Ayres was then in the hands of the enemy, he went to Monte Video, with intent to make a complete discharge there, if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be

(1) 1 New Rep. 23.

(2) 3 East, R. 572.

(3) 1 Taunt. 463.

(4) 1 Taunt. 463.

(5) 1 Marsh, 149.

(6) Park, 27.

practicable ; but while he was still discharging part of his cargo at Monte Video, a loss happened by a peril of the sea ; it was held that as Buenos Ayres, to which other port only in the Plate he had contemplated to go, was at the time of his arrival in the Plate (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, Monte Video must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged (1). Where goods were insured from Heligoland to Memel, with liberty to touch at any ports, and to seek, join, and exchange convoy, warranted free from capture in the port of Memel, and the ship sailed from Heligoland, with orders to go to Gottenburgh, to know whether to proceed to Anholt or Memel, and was captured in her way to Gottenburgh, which is in the track either to Anholt or Memel ; it was held, that this was to be considered as a voyage to Memel, although it was subject to be changed according to circumstances, upon the ship's arrival at Gottenburgh, and therefore the risk commenced on her leaving Heligoland ; and the ship never having reached Gottenburgh, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy, neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture, and consequently the underwriter was liable (2). A policy of insurance from Bristol to Monte Video, or other port in the river Plate, where the ship, after arriving off Maldonado, at the mouth of the Plate, was immediately ordered off by the British commander there (the enemy having before gotten possession of every other port in the river), will not cover a loss which happened to the goods insured by a peril of the sea, after the ship's departure from thence in her way to Rio Janeiro, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs. (3)

Form and construction of.

If no place in particular be mentioned in the ship's destination, or the policy is on the ship at and from a place to any port or ports whatever, it must be taken to mean that the destination or port to which the ship is to sail, must be the destination or port for the purposes of the voyage ; an open roadstead, being the

(1) 12 East, 283.

(2) 1 M. & S. 46.

(3) 11 East, Rep. 22.

Form and construction of.

usual place of loading and unloading, was held to be a port within the meaning of a policy of this general nature. (1)

As to the course of the vessel and duty of the insured during the voyage, as relating to the voyage.

The vessel must sail in the direct course of her voyage, and observe the stipulations of the policy in this respect; she must also use reasonable expedition during the whole course, or the insurers will in general be discharged. The course of the voyage does not mean the nearest possible way, but the regular and usual course; accordingly stopping at certain places on the voyage is no deviation if it be customary so to do, but such usage can only be supported by long and regular practice (2). A policy at and from Martinique, and all and every West India islands, warrants a course from Martinique to islands not in the homeward voyage. (3) A policy of insurance on goods at and from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, does not warrant the assured, after having touched at C. for orders, and gone on to S., a more distant port, in retouching at C. for orders; but if the policy be to any and all ports and places in the Baltic, forwards and backwards, and backwards and forwards, it is otherwise (4). If there be several ports of discharge mentioned, the ship must go to them in the order set down in the policy, unless some usage or particular fact appear to vary the rule (5); and if the ports be not specifically enumerated, then the ship must take them in their geographical order (6). Where the insured intends a deviation from the direct course of the voyage insured, it is always provided for, and the policy adapted to it, unless fraud be intended by it. But where the voyage described in the policy is not the voyage intended, and the insured, meaning to send the ship on a different voyage, gives the captain his instructions accordingly, this is not the case of an intended deviation, but the case of a different voyage from that contracted for in the policy (7); and when a ship is insured from one port to another, the policy does not attach, unless she sail on the voyage insured (8). If a ship insured for a certain time, sail before the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the

(1) 2 B. & A. 460.

(2) Cowp. 601.

(3) 4 Taunt. 229.

(4) 16 East, 312.

(5) 6 T. R. 531.

(6) 6 T. R. 533.

(7) Dougl. 18. See *vid.* 2 Bla. Rep. 343.

(8) 2 T. R. 30.

course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. (1) Form and construction of.

Clauses are frequently introduced, giving liberty to the insured to touch, stay, trade, &c. at any port or places in the course of the voyage. These must be always interpreted as subordinate to the voyage insured, and, however general, they do not give the captain a power to change the voyage, but only to extend it to places in the usual course of the voyage (2). If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named (3). If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distances (4). Under a liberty to touch and stay at all ports, for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure (5). Whether the purpose is within the scope of the policy is a question for the court (6). Where by a policy a ship was insured at and from Hull to her port or ports of loading in the Baltic sea and Gulf of Finland, with liberty to proceed to and touch and stay at any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation, it was held, that the ship having touched and stayed at Elsinore and Dantzic to deliver goods, Pillau being her port of loading, was a deviation (7). Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured (8), or other merchandize, provided the ship does not thereby exceed the period allowed for her remaining there (9). Under a policy of insurance of goods at and from London, to any port or ports, place or places in the Baltic, backwards and forwards, with leave to touch and stay at any ports and places for all purposes whatsoever, the insured may wait at any port for information as to what port in the Baltic the ship might safely proceed to discharge her cargo, that being one of the objects of the adventure, arising out of the troubled and shifting state of the different governments on the Baltic

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| (1) 2 Term Rep. 30. | (7) 5 B. & A. 45., see 9 East. |
| (2) Dougl. 271. 5 B. & A. 45. | 135. 11 Ibid. 347. 12 Ibid. 131. |
| (3) 3 Taunt. 16. | (8) 3 Taunt. 419. 4 Taunt. |
| (4) Ibid. | 123. |
| (5) 4 Taunt. 511. 4 Camp. 123. | (9) 1 Taunt. 450. |
| (6) 4 Taunt. 511. 4 Camp. 123. | |

Form and construction of.

shores from the pressure of the French arms, and this liberty, it seems, is not abridged by a subsequent special leave given to wait for information, &c. off any ports and places (1); when the policy expressly mentions the purpose for what the ship is to stay, the master cannot depart therefrom; and where leave was given to discharge part of the cargo at a port, it was held that this did not imply a leave to take in other goods (2). And where a policy from Para to New York, with leave to call at any of the windward and leeward islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the windward and leeward islands, without being deemed a deviation; it was held that on this policy, the ship having proceeded to two of the leeward islands for a purpose wholly unconnected with the voyage, it was a deviation (3). Where there is a liberty "to touch and stay" at a place, this does not confer the privilege to break bulk or unload any part of the cargo (4). The policy not limiting the time of stay, whether a ship has staid an unreasonable time is purely a question for the jury. (5)

Clauses of liberty to take prizes, &c.

Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorize the ship to lie by nine days off a port waiting for an enemy's ship to come out when she should have completed her cargo, although she lay in wait during that time within the limits of her fishing ground (6). A leave in a policy to see prizes into port, does not authorize the remaining in port whilst the prize is repaired (7). Sometimes a policy contains a clause giving liberty to cruise for a certain time in the course of her voyage; this is to be taken as only one continued period of time, and not for several periods, unless it be so expressed (8). A letter of marque is not at liberty to cruise after prizes, but she may give chase to an enemy that comes in her way, and it has been determined that where a letter of marque chases an enemy, loses sight of her in the night, and in the morning again engages her, this is no deviation (9). Whether an insurance of a ship, with

(1) 15 East, Rep. 278.

(2) 5 Esp. 96. Park. 439.

(3) 4 B. & A. 72.

(4) Hill v. Wardel, 1797. Montefiore, tit. Insurance.

(5) 4 Taunt, 511. 3 Camp. 469.

(6) 2 Taunt. 428.

(7) 1 Camp. 265. Park. 449.
6 East, 202.

(8) Dougl. 509.

(9) Jolly v. Walker, at N. P. East. Vac. 1781. Park, 448.

Beawes, 316.

or without a letter of marque, upon a certain voyage and commercial adventure from A. to B., enables her to chase for the purpose of hostile attack, and capture any vessel she may happen to descry in the course of the voyage, insured in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not, or whether those words are to be confined to a leave to employ force only for the purpose of *defence* (including a liberty of attack and chase only as far as they may be fairly supposed to promote ultimate security), must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if any such received practice there be in the use of them; at any rate such words do not appear to authorize direct cruizing out of the course of the voyage in search of prize (1). A policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him after the capture, and in the course of the further prosecution of the voyage, in shortening sail, and laying to, in order to let the prize keep up with him for the purpose of protecting her as a convoy in the port, in order to have her condemned, though such port were within the voyage insured. (2)

Form and construction of.

Deviation is a departure out of the prescribed course of the voyage, and in general will, unless there be some excuse for the deviation, invalidate the policy from the time of the deviation (3). An intention to deviate, not carried into effect, does not vitiate the policy (4). A policy of insurance is effected on specific goods on board a certain ship, named on a voyage *at and from A. to B.*, and another policy is also made on any kind of goods, as interest should appear, *on board ship or ships* on the same voyage, warranted to sail within a limited time, but no circumstance relating to the first policy is communicated to the underwriters

Deviation, definition of.

(1) 6 East, 202.

(2) 6 East, 45.

(3) 2 Lord Raym. 840. 2 Salk. 444, and the insurer may

retain the whole premium after a deviation.

(4) 2 H. Bla. 348. ante, 468.

Form and construction of.

of the second, nor do they know that the first was made: goods to the full amount of the sum insured in the second policy are put on board a ship (not the ship named), which sails within a limited time from A., with *an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point*, the underwriters of the second policy were held liable for the loss (1.)

What will justify deviation.

Nothing, it seems, will justify a deviation but necessity (2), or a voluntary departure out of the appointed course as being necessary for the good of all concerned; a voluntary, without being a necessary deviation, is not justifiable. The cases where a deviation is generally allowed are, stress of weather, want of necessary repair, the sickness of the crew (3), escaping from an enemy, and mutiny of the crew; or where the ship is otherwise by force compelled to go, or taken out of the voyage (4). A vessel may deviate from her track to seek convoy, when it is for the common good and preservation, and is not expressly prohibited by the terms of the policy (5). And where a ship, to avoid a danger for which the insurers would have been liable, runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss (6), but it would be otherwise if the danger avoided was excepted in the policy (7). Where a master was ordered by the commander of a king's ship to put to sea to examine a strange sail, which order he obeyed without compulsion or remonstrance, the policy was held vacated. (8)

Duty of master in case of a justifiable deviation.

When a ship is compelled by any necessity to deviate from the regular course of her voyage, she must pursue the voyage of necessity, so as to reach her port of destination by the shortest and safest course she can take, and any wilful and unnecessary departure or delay will be a new deviation, which will discharge the underwriters as much as if it had been a deviation from the

(1) 2 H. Bla. 343.

(2) 1 Bos. & P. 313.

(3) But where sickness is set up as an excuse for deviation it must be shewn that the surgeon was provided with medicines suitable to the voyage, 3 Esp. 257.

6 T. R. 656.

(4) 2 Stra. 1264.

(5) Holt, 185. 11 East, 22.

(6) 4 Camp. 249.

(7) 4 Camp. 246.

(8) 2 Camp. 350. S. C. 11 East, 205.

original voyage (1). As to stress of weather, a ship driven by a storm into any port out of the course of her voyage is not obliged to return back to the point from which she was driven, but may make the best of her way to the port of her destination; and therefore where a ship was insured from Bengal to London, the adventure to commence on her arrival at Fort St. George in her way to England, but being found leaky and in very bad condition she sailed for Bengal to be refitted, there being no means of refitting her at Fort St. George, and Bengal being the nearest place: this was held no deviation (2); so where in a policy on goods on board a particular ship from A. to B. "against sea risk and fire only," in the course of the voyage from A. to B. the ship was carried out of the course of the voyage by a king's ship, but being afterwards released she proceeded on the voyage insured, and while so proceeding the goods insured sustained sea damage, and the underwriters were held liable (3). And if a ship be driven out of her loading port, and obliged to go into another port, and after fruitless attempts to get back again she does the best she can to get from thence to the place of her destination, that will be sufficient to charge the underwriters (4); neither does it vacate the policy if such ship complete her loading at the port into which she is so driven, if there is a custom to that effect. (5)

Form and construction of.

The policy frequently stipulates or contains a warranty that the ship shall sail on or before such a day; this part of the insured's contract must be strictly performed, and though the ship be prevented by any accident, as the sudden want of repair, the appearance of an enemy, &c. from sailing till the next day, though it may be right in such case not to sail on the day, yet the warranty is not complied with, and there is an end of the policy (6). If an embargo be published before the ship sails, and the captain puts himself into it, but in the hope of its being taken off, this will excuse his not sailing by the day (7). If a ship once break ground and get fairly under sail on or before the day, this is a compliance with the warranty, though she be drove back by stress of weather, or detained by an embargo (8). If a

Stipulation to sail on or before a particular day.

(1) Dougl. 271.

(2) 1 Atk. 545.

(3) 1 New R. 181.

(4) 1 T. R. 22.

(5) 1 T. R. 22.

(6) Montefiore, tit. Ins.

(7) Dougl. 352.

(8) Cowp. 607.

Form and construction of.

ship insured at and from Jamaica, warranted to have sailed on or before a particular day (with a return of premium in case of convoy), sail on or before the day from her port of lading, with all her cargo and clearances on board, to the usual place of rendezvous at another part of the island, for the sake of joining convoy there ready, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day (1). On a warranty to sail from Jamaica on or before a day certain, if the ship departs from her port of loading on that day, with her cargo and clearances on board, and proceeds to the place of rendezvous in that island, expecting to find a convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, though the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready (2). A French ship being warranted to sail from Guadaloupe on or before a day certain, if she take in all her cargo and clearances, and leave her port of loading before the day, and sail to another part of the island in the direct course of her voyage, merely in the hopes of joining convoy and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain her beyond the day, and although it should be a condition inserted in one of her clearances that she should pass that way to take the orders of government (3). If in a policy of insurance "at and from Surinam and all or any of the West India islands to London," the ship is warranted to sail on or before the 1st August, it is a sufficient compliance with the warranty if she sail on or before that day from her final port of loading on the homeward voyage, though she afterwards touch at one of the West India islands to join convoy (4). A warranty to sail on or before a particular day means to sail equipped for the voyage, that is, complete with her complement of men, clearances, &c (5). If a ship warranted in a policy of insurance to sail on or before a particular day, leaves the place before the day without her complement of men and clearances, meaning to get them at a port lying in her track, and the day appointed passes by without her having procured them, the warranty has not been complied with. (6)

(1) Cowp. 601.

(2) Dougl. 357.

(3) Dougl. 361. 366. n.

(4) 11 East, 515. 2 Camp.

247. S. C.

(5) 3 M. & S. 456. 4 Camp.

111. S. C.

(6) Id.

A distinction is taken between a warranty "to sail," and a warranty "to depart," in a policy of insurance: the latter means that the ship shall be out of port (1). A ship was insured at and from Memel to England, warranted to depart on or before the 15th September; having taken in her cargo at the port of Memel, she got under weigh with the intention of proceeding on her voyage on the 9th September, with a prospect of favourable weather, but was obliged by contrary winds to come to an anchor near the mouth of the harbour, where she was detained till after the 15th: it was held that though this would have been a compliance with a warranty to sail by such a day, yet this warranty being to depart, which could only mean from the port of Memel, it had not been complied with. (2)

Form and construction of.

Another species of warranty often inserted in policies in time of war, is to sail or depart with convoy; this, like other warranties, must be strictly performed; and if the ship depart without convoy, from whatever cause, the policy becomes void, and the insurer shall not be answerable even for the perils of the sea. There are five things essential to a sailing with convoy: 1st, It must be with the regular convoy appointed by government. 2d, It must be from the place of rendezvous appointed by government. 3d, It must be a convoy for the voyage. 4th, The ship insured must have sailing instructions. 5th, She must depart and continue with the convoy till the end of the voyage, unless separated by necessity.

Stipulation to sail with convoy.

1st, It must be with the regular convoy appointed by government. A convoy within the meaning of this warranty is a naval force under the command of an officer appointed by government for the protection of merchant ships and others during the whole voyage, or such part of it as is known to require such protection. A warranty to sail with convoy means such a convoy as government shall appoint: sailing with any other force than the convoy regularly appointed will not satisfy the warranty (3). By statute 22 Geo. 2. c. 33. art. 17. the officers and seamen of ships employed as a convoy are subjected to punishment for any misbehaviour.

(1) 3 M. & S. 461. 4 Camp. 1 Marsh. 570. 6 Taunt. 241. S.P. 84. S. C. (3) 2 Hen. Bla. 551. Monte-

(2) 3 M & S. 461. 4 Camp. 81. fiore, tit. Insurance.

Form and construction of.

2d, It must be the place of rendezvous appointed by government: The ship must sail from such place, for though it is usually expressed in general terms in the policy, to depart or to sail with convoy, yet as it would be often impracticable or inconvenient to appoint a convoy to sail from each particular port, there are certain places of rendezvous appointed by government for general convenience, to each of which the merchant ships from the neighbouring ports may repair by a given day for convoy, and it is a sufficient compliance with the warranty if a ship depart with convoy from such place of rendezvous. This, like most other questions relating to insurance, is regulated by the general usage of trade (1). A ship, or goods insured, are protected by the policy in their passage from the port of loading to the place of rendezvous appointed by government, and therefore if the parties mean to vary from the common course, and to specify any particular case of joining convoy, this must be particularized in the policy. (2)

3d, It must be a convoy for the voyage. A warranty to sail with convoy generally means a convoy for the whole voyage (3). Where part of the premium is to be returned in case the ship sail with convoy and arrives, this means a convoy for the voyage (4). It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way (5). Evidence of an usage however, when not inconsistent with the terms of the policy, is admissible to shew that the convoy could not have been meant for the whole voyage, and this warranty does not always mean a convoy from the port of departure to the port of destination, as it means such a convoy as government shall appoint for the voyage insured (6). And where a policy of insurance is made on a ship on a voyage from A. to C., warranted to depart with convoy for the voyage, the convoy appointed is to B., a port in the course and near to C.; this is a compliance with the warranty, and the underwriters are liable, the ship being captured on the passage from B. to C. (7)

(1) Montehore, Dict. tit. Ins.

(2) 2 Stra. 1265.

(3) See 1 Taunt. 249.

(4) Dougl. 72.

(5) 1 Taunt. 249.

(6) 2 H. Bla. 551.

(7) Id.

4th, The ship insured must have sailing instructions. Sailing instructions are written or printed directions delivered by the commanding officer of the convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the places of rendezvous in case of dispersion by storm, or by an enemy, &c.; such therefore is the utility and necessity of these sailing instructions, that no vessel can have the full protection and benefit of convoy without them. Sailing instructions are in general so essential to a sailing with convoy, that in general, unless they be obtained the warranty is not complied with (1); and they must, in general, be obtained before the ship leaves the place of rendezvous (2). Yet sailing instructions are not so essentially necessary, but that there may be cases in which the want of them will be excused (3): stress of weather will excuse the want of them (4); so if the commanding officer refuse to give them. (5)

5th, The ship must depart and continue with the convoy till the end of the voyage, unless separated by necessity. Therefore if the ship insured, by negligence or delay in getting under weigh at the same time with the convoy, lose the benefit of protection, though for ever so short a time, this is not departing with convoy, and the policy becomes void (6); and it is no excuse for not sailing with convoy that the ship was prevented from joining the convoy by the weather (7). If the ship sail before the day to join convoy, this shall be a compliance with the warranty, though the way to the place of rendezvous be out of the course of the voyage (8). If the voyage be begun, the usage may justify going out of the course to join convoy (9). Where a policy warrants that a ship, if she proceed on a particular day, shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships between the loading port and place of rendezvous (10). A ship is to be considered as sailing with convoy if she join and receive sailing

(1) *Hibbert v. Pigou*, B. R. E. T. 23 Geo. 3. *Park on Ins.* 7 ed. 498. 510. *Montefiore*, tit. *Ins.* 1 Bos. & Pul. 5. 2 Bos. & Pul. 164. 3 Esp. 124. S. C. 4 Taunt. 178.

(2) 2 Bos. & Pul. 164.

(3) 1 Bos. & Pul. 5.

(4) *Stra.* 1250.

(5) *Park*, 497.

(6) *Park* 510. *Montefiore*, tit. *Insurance*.

(7) 4 Campb. 54.

(8) *Cowp.* 601.

(9) *Dougl.* 348.

(10) 4 Campb. 62.

Form and construction of.

instructions within the limits of the port, although the convoy drop down fifteen leagues from the place of loading several days before such ship, she being detained for want of a pilot (1). Where no convoys are appointed at the port from which a ship commences her voyage, she is not bound to wait for convoy at a port in the course of the voyage from which convoys are appointed (2). But in an action on a bill of lading against the master for not sailing with convoy, it is a sufficient defence to shew that the ship was delayed by the default of the plaintiff's agent in not putting on board the plaintiff's goods, and that after receiving them the master made every practicable exertion to join the convoy (3). The taking of goods in after the convoy's signal to weigh does not vacate a policy on goods, if no delay is thereby occasioned (4). The ship must continue with the convoy during the voyage (5); but an unforeseen separation from the convoy is no breach of the warranty to sail with convoy (6). The liberty to seek, join, and exchange convoy is introduced for the benefit of the assured, and therefore any restraint imposed by them on the captain's option in this particular is immaterial (7). If the master, through fraud or negligence, leave his convoy, it is a breach of the warranty; or if a ship separated from the convoy neglect to rejoin it, the insurers are discharged. (8)

Convoy Acts.

By the 43 Geo. 3. c. 57. s. 1. and 2., which expired at the end of the last war (9), it was enacted, that all ships belonging to the king's subjects are forbidden (except as thereafter provided) to sail without convoy, and to separate therefrom without leave. By s. 3. a penalty of £1,000 is imposed on the master of any ship who shall sail without convoy, or shall separate without leave; and £1,500, if the ship be laden with naval or military stores; with a power however to the court to mitigate the penalties to any sum not less than £50. By s. 4., in case of a ship sailing without convoy, or separating, the policy of assurance is made void with respect to the property of

(1) 4 Camp. 107.

(2) 4 Camp. 344.

(3) *Id.*

(4) 11 East, 131.

(5) 3 Lev. 320. Carth. 216.

S. C. 2 Salk. 443. 1 Show. 320.

4 Mod. 58.

(6) Dougl. 74. 271. 736.

(7) 1 M. & S. 46.

(8) Montefiore, tit. Insurance.

(9) Similar acts are passed at the commencement of a war, and the decisions here collected may be applicable, and therefore it may be useful to insert this.

the persons who have the charge of the ship, or of any person interested in the ship or cargo, who shall have directed or have been privy or instrumental to the sailing or separating; and a penalty of £200 is imposed for settling or paying losses upon such policies. By s. 5. it was enacted, that it shall not be lawful for any officer of the customs to suffer any vessel to be cleared outwards from any port in the kingdom, until the person having charge of the vessel shall have given bond with one surety in the penalty of the value of the ship, conditioned not to sail or depart without convoy, contrary to the directions of that act, nor to separate without leave. Sect. 6. contains the exceptions from the operations of the above-mentioned clauses, among which it is specified, that nothing in that act contained, by which ships or vessels are required not to sail or depart without convoy, shall extend to any ship or vessel for which a licence shall be granted to sail or depart without convoy, either by the lord high admiral of Great Britain, or by the commissioners for executing the office of lord high admiral for the time being, or any three or more of them, for that purpose, or to any ship or vessel proceeding with due diligence to join convoy from the port or place at which the same shall be cleared outward, in case such convoy shall be appointed to sail from some other port or place, except nevertheless as to the bond thereby required to be taken upon the clearance outward of such ship or vessel. Ships sailing from foreign ports were not within the restrictions of this act, unless there be persons at those ports authorized by the admiralty to grant convoy or licence (1); nor will such an authority be implied upon the mere circumstance of the admiral on the station having usually appointed convoys (2). Under this act it has been held, a ship cannot legally proceed without convoy from port to port to join convoy, unless a bond has been given that she shall not sail without convoy (3). A ship licensed to sail without convoy provided she is armed with a certain force, must take that force on board before she breaks ground. A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy (4). A vessel which sails with convoy

Form and construction of.

(1) Holt, 185.

(2) Id.

(3) 3 Taunt. 131.

(4) Ibid.

Form and construction of.

and is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port (1). The sailing with convoy required by this statute, is a sailing with convoy for the voyage. This statute does not avoid a policy on the ground of the ship sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy (2). Every person who ships goods on board a vessel which sails without convoy does it at his own peril of her having a sufficient licence for the voyage, without which all insurances on his goods are void by the stat. 43 G.3. c. 57. (3), although the owner of the goods supposed and intended that the ship should have a sufficient licence, and although he lived at a distance from the port, and had no concern with the management of the ship, or the obtaining for her the necessary documents. A licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run without licence or convoy for the residue of her voyage after she has touched at the port (4). A licence to Gibraltar will not legalize a voyage to Palermo, Messina, and Malta, touching at Gibraltar, and finding there neither licence or convoy (5). In order to show that a voyage without convoy from a foreign port is illegal, it is incumbent on the underwriter to prove that there is convoy occasionally appointed from that port, or some one resident there authorized to grant licences to sail without convoy (6). If a policy be effected on a foreign-built ship, British owned (which not being required to be registered may sail without convoy), it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign-built. (7)

a. The subject matter of the insurance.

In the body of the policy the insurance is usually described to be "upon any kind of goods, and upon the body, tackle, apparel, ordnance, ammunition, &c." This general insurance is

(1) 5 Taunt. 49.

(2) 1 Taunt. 250. n.

(3) 7 Taunt. 178.

(4) 4 Taunt. 178.

(5) 4 Taunt. 178. See 15 E. R. 517.

(6) 4 Taunt. 493.

(7) 2 Bos. & Pul. 209.

afterwards qualified by shortly after describing the insurance to be on something in particular;¹ this is usually done by subscribing the thing particularly insured at the foot of the policy. A policy may be effected upon "ship or ships." (1) An insurance "of goods and merchandizes" will cover dollars if entered at the custom-house (2); but not bank notes (3). *Respondentia* cannot be insured under the denomination of goods; by the custom of merchants, *respondentia* must be insured under a special denomination (4). Provisions which are necessary for the ship's crew, and on board at the time of insurance, are comprehended under the word "furniture" and are protected by a policy on the ship and furniture (5). But in an insurance on goods generally, goods lashed on deck, the captain's clothes and ship's provisions are not included unless specifically named; but it includes vitriol stowed on deck. (6) It is a question whether such an insurance includes coin or jewels (7). In East India insurances, the words "goods, specie, and effects," comprehend money expended for the use of the ship (8). An insurance may be effected on *profits* generally, without more description, and engrafted upon a policy on ship and goods in the common printed form, for a certain voyage, with a return of premium for short interest, the assured proving an interest in the cargo (9). Frequently the particular description of goods or thing insured is inserted, and it is better that it should be so.

Form and construction of.

When the value of the thing insured is not specified, it is termed an *open* policy; that is, an insurance open to inquiry as to the amount of the interest of the insured in the property insured. The value of the goods or ship is frequently inserted in the policy, in which case the policy is called a *valued* policy. The only material difference between an open and a valued policy is, that in case of litigation the insured must, in support of an action on an open policy, prove in the first instance the amount of his interest in the property insured; but on the trial of an action on a valued policy such amount is *prima facie* admitted, and no such evidence is necessary though the underwriter is still at

(1) 2 H. Bla. 343.

(2) Thomas v. the R. Exch. Ins. Comp. Dampier J. Cornwall Summer Assizes, 1815. Manning's Index, tit. Insurance, (B. a.)

(3) Id. S. C. not S. P. 1 Price, 195. See 1 H. Bla. 283.

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(4) 3 Burr. 1394. 1 Bla. R. 405.

(5) 4 T. R. 206.

(6) Park, 26. 4 Campb. 142., see 2 Chitty's Rep. 22.

(7) Park, 26.

(8) Park, 14.

(9) 16 East, 218. 3 Campb. 276.

Form and construction of.

liberty to dispute the amount of the interest, if he can shew that it has been grossly overrated. (1)

In every contract of insurance, whether on ship or goods, there is an implied and frequently an expressed warranty, 1st, that the ship shall be seaworthy when she sails on the voyage; 2dly, that the ship or goods shall be provided with every thing necessary for the voyage; 3dly, that the ship shall be navigated, or the goods laded, stowed, and unladed, with reasonable care and skill; and 4thly, that the voyage shall be lawful, and performed according to law, and in the usual course and without deviation. We have already considered the law relative to the last branch of this contract and warranty, and we shall therefore now only consider the law applicable to the first three.

Warranty as to ship's seaworthiness.

First, *That the ship shall be seaworthy.* In every insurance, whether of ship or goods, there is a warranty on the part of the insured, that the ship shall be seaworthy, or in other words "tight, staunch, and strong," and fit for the service in which for the present time she is engaged, which is presumed till the contrary appear (2). If a ship have an insufficient bottom, or unsound timbers, or is without knees, or proper tackle, she is not seaworthy (3). But to constitute unseaworthiness, the ship must be so at the time of her departure on the voyage (4); if she be so whilst in port, and before her departure, it will not be considered as a breach of this warranty (5). And where a ship insured at and from a port sails on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry, and the defect was discovered and remedied before any loss accrued, and a loss subsequently accrued in no degree attributable to the ship having been overladen in the first instance, it was held that the underwriters were liable for such loss (6). So it is no breach of this warranty, if the ship becomes unseaworthy after her departure on the voyage, though it will frequently be presumed that the ship was unseaworthy at the time of her departure if she becomes so during the voyage from no cause in particular, and especially if it becomes so very shortly after the commencement of the voyage. (7)

(1) See ante, 458.

(2) 3 Taunt. 299. 3 Dow. 23.

(3) 1 Dow. 32. 3 Dow. 57.

(4) Dougl. 732. 1 Dow. 336.

(5) 3 Taunt. 299.

(6) 2 B. & A. 320.

(7) 1 Dow. 336. 3 Dow. 24.

4 Dow. 269. As to the doctrine of seaworthiness in general, see Park. 335 to 344. Age of ship, thirty-five, not a proof of want of seaworthiness, but of weight in evidence, 1 Dow. 344.

Secondly, *Of the warranty that the ship or goods shall be provided with every thing necessary for the voyage.* There is an implied warranty in every policy of insurance, that the ship or goods shall be provided with every thing necessary for the voyage, that she shall have a captain and crew of competent skill, provided with all necessary stores, and be in every other respect fit for the voyage, and for the service in which the ship is for the present time engaged (1); a loss arising from a defect in this respect is fatal, and the policy will be void. The insured must, therefore, be prepared with and complete every thing to commence and fulfil the voyage (2); but it should seem that, provided the insured fulfil this obligation in the first instance at the time of the ship's commencement of the voyage, it will be a sufficient compliance with this warranty; and therefore, where the assured had once provided a sufficient crew, it was held that the negligent absence of all the crew at the time of the loss was no breach of the implied warranty that the ship should be properly manned. (3)

Form and construction of.

Of the warranty that the ship or goods shall be provided with every thing necessary for the voyage.

It is necessary that the ship be provided with all documents, which from the want of them would create a loss (4). By the statute 31 Geo.3. c.54. s.7., for regulating the African slave-trade, it was necessary that the certificate of the captain's having served as that act required should be attested by the owners of the ship or ships in which the service was performed, and it was held that the insured could not recover on a policy where the captain had not such certificate (5). If a ship has any simulated or illegal papers on board, without leave of the underwriters, or has not a regular clearance, and the loss be attributable thereto, the policy will be avoided. (6)

The ship should be furnished with ground tackling sufficient to encounter the ordinary perils of the seas (7), and with good sails to enable her to proceed with expedition (8); so the ship must have a sufficient crew, and a captain of competent skill (9),

(1) 3 Taunt. 299.

15 East, 37.

(2) 6 Taunt. 65. 12 East, 381.
4 Campb. 119. 3 East, 283.

(5) 7 T. R. 186.

(6) See 15 East. 46. 70. 3 Camp.

(3) 2 B. & A. 73.; and see id. 357. 3 Taunt. 554.
320. 5 B. & A. 171. 1 Campb. 421.

(7) 3 Dow. 57.

(8) 1 Campb. 1.

(4) The neglect to have a bill of health, insurers not liable if loss arise therefrom. Holt, C. N. P. 767. 4 Campb. 389. 1 Stark. 212.

(9) 7 T. R. 160. Selw. N. P. 937, note. 14 East, 481. 2 B. & A. 73. 5 B. & A. 171.

Form and construction of.

but a full complement of men is not necessary in harbour (1). A neutral vessel, as we shall hereafter see, must have documents to prove her neutrality (2). So there should be a pilot on board when necessary by the usage of trade or the laws of the country, and if the master should neglect or refuse to take one, the policy will be vacated (3). But in general, to constitute a breach of this warranty, it must be broken at the time of the ship's departure on the voyage. (4)

Of the warranty that skill and care shall be observed throughout the whole transaction.

Thirdly, there is an implied warranty that the vessel shall be navigated with skill and care during the voyage, and the cargo, if insured, shall be laded, stowed, and unladed in a proper manner, and that the same shall be taken care of during the voyage. We have already considered the master's duties and liabilities as to the manner of lading, &c. the cargo, when he acts under a contract for the conveyance of it, and the observations and law under that head will be here applicable; if the master or the insured are guilty of any neglect or breach of contract in this respect, the insurers will be discharged. (5)

Of the stipulation as to neutrality.

As the premium is meant to be proportioned to the nature of the risk, and as the general words of the policy, unless restrained or qualified by some special stipulation, subject the insurer to every loss by capture, it is of great importance in times of war between maritime states, to ascertain whether the ship or goods meant to be insured be liable to capture, as belonging to either of the belligerent powers. If the insured profess to be the subject of a neutral state, and mean to be insured as such, the insurer requires him to warrant the ship or goods to be neutral property. This is done by inserting in the policy either the words "warranted neutral," or "warranted neutral property," and sometimes the warranty is, that they belong to the subjects of some particular neutral state.

Neutral property, in the sense of which that expression must be understood in this warranty, is that which belongs to the subjects of a state in amity with the belligerent powers, and

(1) 3 Taunt. 299.

(2) 3 Taunt. 285. post.

(3) 7 T. R. 160. 48 Geo. 3. c. 104. *52 Geo. 3. c. 39.

(4) 3 Taunt. 299. Holt, 30. 2 B. & A. 73. 5 B. & A. 171. 1 Campb. 421. ; in which last case it

was held that underwriters were not discharged by the act of the assured in taking on board three prisoners on parole, who occasioned a mutiny, terminating in the loss of the vessel.

(5) See ante, 393. 397, 398.

entitled to all the indemnities of the property of that state (1). Form and construction of. The property insured as being neutral must be neutral to the purpose of being protected, and the insured must do or omit nothing on his part, at any time before or after the policy is made, to constitute or forfeit the neutrality, or the insurance will be void. The ship must therefore be navigated according to the law of nations, and according to the treaties by which she is bound (2); and she must also be furnished with all documents and papers which are evidences of her neutrality, and of her observance of the regulations of particular treaties, to which she is bound to conform (3); and a neutral ship must be provided with documents to prove her neutrality, although the production of those documents would, if she had been captured by one particular belligerent, have rendered her liable to condemnation under an ordinance of that power (4). We have already considered the rights, duties, and liabilities of neutrals (5), and the necessary documents that should be on board a neutral ship (6). And where an American bound from London to Riga was taken by the Danes, and condemned for circumstantial reasons, and amongst others the want of a sea passport and muster rolls; she was provided with false clearances from Bergen, but they were not produced; her sea passport would have proved she had come from London, which under the Berlin decree would be a ground of condemnation by the French; it was held, that although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents (7). A forfeiture of the neutrality by the wilful act of the master or mariners after the commencement of the voyage, though in some cases it may amount to barratry, is a breach of the warranty, and avoids the policy for the time it is committed, nor can the insured recover on it for any loss happening afterwards, though it proceed from a cause wholly unconnected with the warranty, for it is of little importance to the insured whether a ship be liable to capture as being an enemy's property, or for having forfeited her neutrality (8). It would be quite impracticable to point out the various acts in

(1) See Montefiore, *tit. Insurance*.

(2) 7 T. R. 705.

(3) *Id.* 5 East, 398. 7 T. R. 681. 2 Esp. 615.

(4) 3 Taunt. 285.

(5) See ante, 1 vol. Index, *tit. Neutrals*.

(6) See ante, 1 vol. 487.

(7) 3 Taunt. 285.

(8) Montefiore, *Dic. tit. Insurance*. 8 T. R. 230. 234.

Form and construction of.

detail which would constitute a breach of the contract of neutrality, as they must necessarily depend upon the law of nations, and the particular treaties of states. (1)

If a loss arise from an act of the belligerent states which is against the law of nations or the treaty with the neutral state, the insurer will be liable; and therefore an assured upon an American ship and cargo, provided with such a passport as was required by the treaty between America and France, and with all other usual American papers and documents, was held entitled to recover against an underwriter of a policy on such ship and goods in the case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French court of admiralty, such sentence proceeding on the ground of a breach of French ordinances requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty. (2)

It is sufficient if the warranty be true when made. The risk of future war is undertaken by the insurer in every policy. The warranty is, that things shall stand so at the time, not that they shall continue so. If goods be insured from A. to B. in a neutral ship, it is sufficient to charge the underwriters that the ship was neutral when she sailed, though hostilities commence during her voyage (3). Two neutral Prussians, one of them resident in England and the other at Koningsberg, having a licence to export to all Baltic ports, some whereof were hostile, are not precluded from recovering on an insurance of goods exported and confiscated by an act of the Prussian government then neutral. (4)

If a ship be not expressly warranted of any particular country, it should seem there is an implied warranty in a policy of insurance that she shall be properly owned, navigated, and documented according to the laws of that country and her particular treaties with foreign states (5). If a neutral American ship,

(1) See 9 East, 283. 1 Marsh. 119. 5 East, 398. 4 Esp. 108. 477. 3 Bos. & Pul. 207. n. 8 T. R. 230. (4) Anthony v. Moline, 5 Taunt. ante, 1 vol. index, tit. Neutrality. 711.
 (2) 1 East, 663.; and see 9 East, 283. (5) 1 East, 663. 3 Bos. & Pul. 201.

insured here, be captured by a French ship, and condemned in a French court as prize, upon the express ground stated in the sentence of condemnation (which is evidence for this purpose), that the ship was not properly documented according to the existing treaty between France and the United States of America (conjointly with the suppression of papers by the captain after the capture, on which no opinion was given by the court), the neutral assured cannot recover their loss against the British underwriter, although there was no warranty or representation that the ship was American; the neglect of the shipowners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason, such assured of the goods being implicated in the same neglect in their character of shipowners. But it is otherwise in the case of a mere assured of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character. (1)

Form and construction of,

A sentence of a foreign court of prize lawfully constituted is conclusive evidence in an action upon a policy of insurance, upon every matter within the jurisdiction of such court upon which it has professed to decide, though the decision may be unjust and incorrect (3), provided the incorrectness of the decision does not appear on the face of the sentence (4); and no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded, although the sentence proceeded to refer to certain ordinances or documents containing rules to direct the judgment of its courts in the consideration of the question, by which rules the prize court appeared to have regulated their judgment in the conclusion they had drawn (5); and the sentence of condemnation will be conclusive proof of the condemnation, though the ground of the sentence do not appear on the face of it (6). It should seem that

How far the decisions of foreign prize courts are evidence to falsify the contract of neutrality. (2)

(1) Bell v. Carstairs, 14 East 7 T.R. 681. 2 East, 473.
Rep. 374. (4) 7 T.R. 523. 1 East, 663.
(2) See Park, 519. 9 East, 283.
(3) 5 East, 155. 3 Bos. & Pul. (5) 5 East, 155. 99.
201. 2 Marsh. 72. 8 T.R. 239. (6) 1 Maule, 39.

Form and construction of.

the sentence of a prize court, sitting under a commission from a belligerent within a neutral state, would, if acquiesced in by the neutral, be conclusive upon the parties (1); but a sentence of a foreign court of admiralty is only conclusive here in an action on a policy of insurance as to the express ground of the sentence, but not as to any of the premises (noticed in the consideratory part of the sentence) that led to the adjudication (2). And the sentence of a foreign prize court is not evidence of facts which can be collected from it merely by indirect inference (3); neither is it conclusive evidence if the sentence state the special grounds of the sentence, and such special grounds do not necessarily lead to such conclusion; and it will not be conclusive if it be ambiguous and undecisive (4). And a warranty of neutrality is not falsified by a sentence of a foreign court of admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented (5). Where the assured agreed to produce proof of the ship's being neutral, &c. and on the trial in an action on the policy did do so, it was held that the insurers were liable, notwithstanding they produced a French sentence of condemnation to falsify the warranty (6). The mere representation of neutrality is not falsified by the sentence of a prize court. (7)

4. The name, &c. of the ship and master.

The name of the ship, and the place where it lies, and the name of the master of the ship, should be accurately described. A misdescription in the name of the ship or in its qualities will frequently be fatal, for as all ships are not all of equal strength and goodness, nor equally capable of performing any particular voyage, the insurer would be unable to form a just judgment of the risk unless he were informed of the name and description of the vessel. This being inserted in the policy, it becomes a part of the contract that the adventure shall be on board the very ship specified, and no other; nor can any other vessel be substituted for it, unless through necessity, or with the consent of the insurer. To avoid any inconvenience which may arise from

(1) 4 Esp. 25. 27. S. P. *con. (3) 1 Campb. 418. S. P. Dougl. 1 Campb. 429.; and see 8 T. R. 554. *574. 6 Ves. 714. 730.
 230. 268. 270. 274. 1 Rob. A. R. (4) 7 T. R. 523. Dougl. 554.
 135. 139. 140. 144. 2 Rob. 210. n. (5) 8 T. R. 434. 8 T. R. 562.
 S. C. 2 East. 477. 2 Rob. 209. 4 Esp. 25.
 (2) 8 T. R. 192. (6) 3 Bos. & Pul. 499.
 (7) 2 Campb. 151.

an accidental mistake in the name of the ship, it is usual to add in the policy to the name given, these words, "or by whatever name or names the same ship should be called," in which case, although it appear that the real name of the ship was different from that inserted in the policy, yet if the identity of the ship can be proved, and it does not appear that the underwriter will sustain any prejudice, the variance will be held immaterial (1). Where there is a policy on goods to be thereafter declared by ship or ships, if the broker by mistake makes a written declaration on goods by a wrong ship, to which the underwriters put their initials, he may afterwards, in compliance with the orders of the assured, declare upon goods by another ship without the assent of the underwriters, and without a new stamp (2). Insuring a vessel in an English name is no warranty that she is English. (3)

Form and construction of.

The name of the place where the ship is lying at the time of entering into the policy should be described accurately. A policy on a vessel during one month remaining in Portsmouth harbour "securely moored," is not vacated by the vessel's changing her mooring within the same harbour. (4)

The name of the master should also be specified, because his character and ability are frequently material subjects of consideration in estimating the risk. If the name of the master stood alone in the policy, without any clause to enable the insured to employ another in his place, it would be a part of the contract that he and no other be substituted in his place, unless in a case of necessity, or by consent of the insurer: to obviate the difficulties that must arise from this, the following words are always added in our policies, *or whosoever else should go for master in the said ship*; but though this clause enables the owner to change the master when he sees occasion to do so, yet he ought not to do this wantonly or unnecessarily, much less ought he to name one person when he means to employ another, for this could only be done for the purpose of deceiving the underwriters, and would of itself be strong evidence of fraud.

(1) 6 East, 385. 382.

(3) 3 Campb. 382. * 6 East,

(2) 3 Campb. 158. 1 M. & S. 382.

217. S. C. * (4) 6 Esp. 109.

Form and construction of.

5. The losses and risks against which the insurers insure.

The policy next proceeds to state the different perils insured against. The various perils against which the insured means to be protected must be distinctly enumerated in the policy. This part of the policy is so full, that scarcely any loss that is lawful to insure against can be considered as omitted. In our common policies, they are set forth in the following words: "touching the adventures and perils which we the insurers are content to bear, and do take upon us in this voyage, they are of the seas, men of war, enemies, pirates, rovers, thieves, jettisons, letters of marque, reprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality whatsoever, barratry of the master and mariners, fire, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, &c., or any part thereof." Under the words, *and of all other perils, losses, and misfortunes that have or shall come to the hurt, &c.*, every species of risk to which ship and goods are exposed from the perils of sea voyages is embraced. This general contract is however qualified, as we shall hereafter see, by the usual printed memorandum, which will presently be considered in the natural order of the instrument. In most policies are inserted the words "lost or not lost," by which the insurer not only takes upon himself the risk of future loss, but also the loss of any that may already have happened (1). We shall consider the subject of losses within the meaning of the policy in the following order; 1st, by perils of the sea; 2d, by capture; 3d, by jettison; 4th, by arrests, &c.; 5th, by barratry; 6th, by fire; 7th, by other losses.

Loss by perils of the sea.

1st, *By perils of the sea.* Losses by perils of the sea are understood to mean only such as proceed from mere sea damage (2), that is, such as arise from stress of weather, winds, and waves, from lightning and tempests, from striking against rocks, sands, &c., and in these cases the underwriters are liable, if the loss arises immediately from such perils of the sea, though remotely from the negligence of the master or mariners (3). A loss occasioned by another ship running down the ship insured through gross negligence (4), or by misfortune (5), is a loss by perils of the sea; a vessel wrecked by the barratry of the

(1) Marsh. 237.

(2) Marsh. 416.

(3) 5 Barn. & Ald. 171. 2 B.
& A. 73.

(4) 4 Taunt. 126. See 5 Barn.

& Ald. 171.

(5) 3 Esp. 67.

master may be stated to be lost by perils of the sea (1); if goods are stolen on shore after a shipwreck, it is a loss by perils of the sea (2). In moving a ship from one part of an harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore, the court of Common Pleas held this to be a loss by perils of the sea within the policy (3). A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was uneven, and on the tide having left her, she received damage by taking the ground, it was held that this was a loss by a peril of the sea (4); but if a ship, hove down on a beach within the tide way to repair, be thereby bilged and damaged, it is not a loss occasioned by the perils of the sea (5); and a loss occasioned by a species of worm which infests the rivers of Africa is not a loss by perils of the sea (6). If a ship be driven by stress of weather on an enemy's coast, but not materially damaged, and she be there captured, this is not a loss by perils of the sea (7): a loss occasioned by another vessel's firing upon the vessel insured is not a loss by perils of the seas (8). It is the province of the jury to decide, whether the cause of the loss be the perils of the sea or not (9). The insurer is not liable for any damage to the ship or cargo occasioned by the ordinary nature of things; as, if a cable break by the friction of the rocks, and the anchor be lost, the insurers are not liable; but if by some extraordinary accident, or the violence of the winds or waves, it become necessary to slip a cable, or a cable be broke, and an anchor lost, this is a loss by perils of the sea within the policy (10). If animals be insured, their death, occasioned by tempest, shot, of the enemy, jettison in a storm, or other extraordinary accident, is a loss within the policy (11); but not so if occasioned by natural decease, unless the insurers expressly insure them "free from mortality." (12) Upon an insurance on slaves against perils of

Form and construction of.

(1) 2 Camp. 149. 4 Taunt. 127. 248. pl. 10. Comb. 56. 1 Show. 322.

(2) Holt, 149.

(8) 1 Stark. 138. 4 Camp. 289.

(3) 2 New Rep. 336.

(9) Per Kenyon, C. J. Abbott,

(4) 2 Barn. & Ald. 315.

236.

(5) 3 Taunt. 227.

(10) Montefiore, tit. Insurance.

(6) Park, 105. 1 Esp. 445.

(11) 5 Barn. & Ald 107.

(7) Peake, 212. Sec 2 Roll. Abr.

(12) 5 Barn. & Ald. 107.

Form and construction of.

the sea, their death by failure of sufficient and suitable provision, occasioned by extraordinary delay in the voyage from bad weather, is not a loss within the policy, but a loss by natural death which cannot be insured against, since stats. 30 Geo. 3. c. 33. s. 8. and 34 Geo. 3. c. 80. (1) To constitute a loss within the meaning of the words "perils by the sea," it must arise immediately from a peril of the sea, and not from any remote cause brought about by the peril of the sea, for *causa proxima non remota spectetur*; and upon a policy of insurance on goods where the ship, being disabled by the perils of the sea, from pursuing her voyage, was obliged to put into port for repair, and in order to defray the expences of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expences, it was held the underwriters were not liable for this loss as a loss by perils of the sea. (2)

What a presumptive loss.

If there has not been any intelligence received of a ship within a reasonable time after she has sailed (3), it will be presumed that she foundered at sea, and the assured may maintain an action against the underwriter, stating the loss to have happened by the vessel sinking at sea (4). What shall be deemed a reasonable time must depend on the distance and length of the voyage and other circumstances. This time has been generally fixed to six months after the ship's departure for any port of Europe, or twelve months if for any greater distance (5). Evidence of the vessel having sailed on her intended voyage on such a day, and not having been heard of since, is the best evidence of which the nature of such a case admits, and consequently will be sufficient to support the action. It is not necessary to call witnesses from the vessel's port of destination; it is sufficient to prove that she was not heard of in this country after she sailed (6); but it must be shewn that when the ship left the port of outfit, she was bound on the voyage insured (7); for this purpose, the *convoy* bond (8), mentioning the port of destination in the common form, or the charterparty (9), or a licence (10), is *prima facie* evidence; if after a payment founded upon such presumption, the vessel re-appears,

(1) 6 Term Rep. 656.

(2) 5 M. & S. 431.

(3) Park, 105.

(4) Stra. 1199. See also Park, 106.

(5) Park, 107.

(6) 2 Campb. 85.

(7) 2 Campb. 51.

(8) Id.

(9) Id. S. C. not S. P. 1 Taunt. 249.

(10) 3 Campb. 70.

she will belong to the underwriters as upon an abandonment. (1)

Form and construction of.

2d, *By capture.* Capture is where a ship is taken by an enemy in war, or by way of reprisals, or by a pirate: every capture, whether lawful or unlawful, is in general within the meaning of the policy. To constitute a loss by capture within the meaning of the policy, it is not necessary that the ship should be condemned or carried into port or fleet of the enemy (2). A ship is driven by a storm near the enemy's coast, and is there captured, this is a loss by capture, and not by the perils of the seas (3): a vessel barratrously given up to the enemy is a loss by capture (4). A warranty against a capture in port does not extend to a capture in a place within the headlands of a river, but not within the limits of any port (5); but if the place be the point at which vessels on the particular voyage usually unload, it is within the warranty. (6)

Formerly it was a common practice, when vessels were captured by the King's enemies, or by other persons committing acts of hostility, for persons to agree with the captors for ransom of the vessels, and for securing the stipulated ransom, not only to give hostages, but also to bind themselves or the owners for the payment thereof. The law of nations gave a sanction to this practice; but it having been found by experience liable to great abuse, and there being reason to apprehend, that upon the whole it operated more to the disadvantage than the benefit of his majesty's subjects, it was enacted by stat. 22 Geo. 3. c. 25. s. 1. "that it should not be lawful for any of his majesty's subjects to ransom, or enter into any agreement for ransoming any vessel belonging to any of his majesty's subjects, or any goods on board the same, which should be captured by the subjects of any state at war with his majesty, or by any persons committing hostilities against his majesty's subjects;" by s. 2. "agreements entered into, and bills, notes, and other securities given by any

(1) Holt, 242. 2 Stra. 1199. see ante, 487. 2 Campb. 69. Park, 85.

(3) Peake, 212. 2 N. R. 336.

(2) 2 Burr. 694. As to insurance against British capture, see 4 East, 396. 402. 7 East, 449. 9 East, 233. 11 East, 205. 1 M. & S. 52. As to the effect of sentences of condemnation in case of capture,

(4) 2 Campb. 620. 3 Taunt. 508.

(5) 2 Campb. 541.

(6) 2 Campb. 615. 13 East, 394.

Form and construction of.

persons for ransom of such ship, or of any goods on board the same, are declared void," and by s. 3. a penalty of £500 is given to the informer for every offence against this act. This statute having expired with the termination of hostilities in 1783, the same provisions have been repeated *literatim* in subsequent prize acts. See stat. 45 Geo. 3. c. 72. s. 16, 17, 18.

By stat. 45 Geo. 3. c. 72. s. 7. which expired at the termination of the war, it was enacted, that if any ship, vessel, or boat taken as prize, or any goods therein, shall appear and be proved in competent Court of Admiralty to have belonged to any of his majesty's subjects, which were before taken by any of his majesty's enemies, and at any times afterwards retaken by any of his majesty's ships of war, privateer, or other vessel or boat under his majesty's protection, such ship, &c. shall, except those thereafter excepted, be adjudged to be restored by decree of the said Court of Admiralty to the former owners, on their paying for and in lieu of salvage, 1st, if retaken by any of his majesty's ships or hired armed ships, one-eighth part of the true value of the ship, &c. ; 2d, if retaken by any privateer or other ship, &c. one-sixth part of the true value of, &c. ; and 3d, if retaken by the joint operation of one or more of his majesty's ships and one or more private ships, such salvage as the judge of the High Court of Admiralty, or other court having cognizance thereof, shall under the circumstances of the case deem fit, unless the vessel retaken appears to have been, after the taking by his majesty's enemies, by them set forth as a vessel of war, in which case it shall not be restored to the former owners, but shall (whether retaken by his majesty's ships or by a privateer) be adjudged lawful prize, for the benefit of the captors ; and so by ss. 19 and 20. it is enacted, that vessels or goods, taken or retaken, and restored by the commander, &c. of the privateer, &c., through consent or clandestinely, or by collusion or connivance of such commander, &c. without being brought to adjudication, shall upon proof thereof in a Court of Admiralty be adjudged good prize to the king, and a penalty is imposed on such commander, provided that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, and it shall not be necessary for the recaptors to proceed to adjudication till six months, or till the return of the ship to the port from which she sailed ; and the

master, owners, or their agents may, with the consent of the recaptors, deliver and dispose of their cargoes before adjudication; and in case the vessel shall not return directly to the port whence she sailed, or the recaptors shall have had no opportunity of proceeding regularly to adjudication within six months, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors, decree the restitution to the former owners, paying salvage upon such evidence as shall appear reasonable, the expence on such proceeding not to exceed the sum of fourteen pounds. Provisions of similar import as these are usually passed at the commencement of every fresh war.

Form and construction of.

3d, *By jettison*. Jettison is the throwing of any thing overboard, to avoid a threatened danger, as being in danger of wreck or capture. Where the captain of a ship, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea, and was immediately afterwards captured; it was held, first, that this was a loss by jettison, that term in a policy meaning any throwing overboard of the cargo for a justifiable cause; secondly, if not, that it was a loss by enemies; and thirdly, if it were not a loss by jettison, that it was *ejusdem generis* in the strictest sense, and became within the meaning of the words in the policy, "all other losses and misfortunes." (1)

Loss by jettison.

4th, *By arrests, &c.* Among other perils, as we have seen, that the insurers insure against, are those which shall arise from arrests and detainments of all kings, princes, and people, of what nation, condition, or quality soever. The word "princes," here mentioned, must be understood not enemies merely, but those in amity also (2). The word "people," means the ruling or supreme power of the country, whatever it may be, and the words "kings, princes, and people," apply to nations in their collective capacity, and not to the wrongful acts of individuals, as pirates, rogues, and thieves, or a lawless mob (3). A policy of insurance on a ship and stores "at and from a port," in a foreign country, in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port (4); and if the embargo continue, the assured may abandon and recover as for a total

Loss by arrests, &c.

(1) 3 Barn. & Ald. 398.

(2) 2 Burr. 696.

(3) 4 T. R. 783.

(4) 6 T. R. 413.

Form and construction of.

loss (1). * If a ship be seized by the authority of the British government, this is a detention within the policy, for which the insurer is liable (2). A warranty to be free from seizure in the port of discharge extends to a seizure made two miles from the harbour by custom-house officers, who come out in the pilot boat (3), or to a seizure made at the same distance from the harbour, in a roadstead, where ships occasionally unload (4). Upon a loss by seizure, detention, and confiscation, it is sufficient to prove that the property was forcibly seized by the officers of government, without shewing a condemnation. (5)

There is an obvious difference between this kind of loss and a loss by capture; the object of the one is prize, that of the other detention, with a design to restore the ship or goods detained, or pay the value to the owner; and though neither of these should be done, still it must be considered as the arrest of princes, the character of any action depending on the original design with which it was done. An arrest of princes may be at sea as well as in port (6). When a ship is detained in port after a declaration of war, or issuing of letters of reprisal, this more resembles a capture than a detention. If a ship be seized after a cessation of arms, and preliminaries of peace are signed, this is not a capture, but only a detention of princes (7). If a neutral vessel be taken at sea, this is a capture, because it is done as an act of hostility; but if she be unlawfully arrested, under pretence that she committed some offence against the law of nations, this is an arrest of princes. In the case of a ship, seized for navigating against the laws of a foreign state, not paying customs, &c., this shall not be deemed a loss by detention of princes, though perhaps it may amount to barratry of the master (8). A British ship, insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a

(1) 6 T. R. 413.

(2) 2 Lord Raym. 640. Salk. 444.; see also 6 T. R. 413. 8 T. R. 230. 1 Stark. 157.

(3) 3 Camp. 204.

(4) 3 Camp. 205. 15 East, 295.

(5) 3 Camp. 142. S. C. not S. P. 15 East, 35.

(6) Montefiore, tit. Insurance.

(7) 3 Beawes, 316.

(8) Montefiore, tit. Insurance.

hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull: it was held, that this loss of the voyage was not attributable to the arrest or detainment of kings, &c., but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy, though, if the ship had not been detained in the first instance by the king's officer, she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo (1). Where a policy was effected on a ship from London to her lading port in Virginia and back; on her arrival at that port, in January 1808, an embargo was laid on all shipping in American ports, by an act of congress, which contained a proviso, that all foreign ships either in ballast or with goods on board, might depart when notified of that act. The captain had covenanted, by charter-party, to take in a cargo of timber at that port, and return thence to London: it was proved that the embargo was taken off in March 1809, and that the ship did not sail until the August following, and that she was lost on her voyage home: it was held that the captain was justified in remaining in port, and that he was not bound to return with her cargo, or sail in ballast, and that consequently the underwriters on the ship were liable at the time of the loss. (2)

Form and construction of.

5th. *By barratry.* Barratry is any species of fraud committed by the master or mariners, whereby the owners of the ship or goods sustain an injury; as by running away with the ship, wilfully carrying her out of her course (3), sinking (4), or deserting her, dropping anchor with a fraudulent intent, or by either defeating or delaying the voyage with a fraudulent intent (5), or by smuggling (6), embezzling the cargo, or any other offence, whereby the ship or cargo may be subject to arrest, detention, loss, or forfeiture (7). If by reason of these or any other similar acts, the subject-matter insured is detained, lost, or forfeited,

Loss by barratry.

(1) 11 East Rep. 205.

(2) 1 Moore, 163. S.C. 7 Taunt. 462.

(3) Cowp. 143.

(4) For the penal consequences attending the wilful destruction of ships, see 1 Ann. st. 2. c. 9. s. 4. 4 G. 1. c. 12. 11 G. 1. c. 29. s. 6, 7. As to mode and place of trial for

this offence, see statute 28 Hen. 8. c. 15. 43 G. 3. c. 79. Ireland, and c. 113. England.

(5) 4 T. R. 38. 6 T. R. 383.

(6) 1 T. R. 252. 3 T. R. 277.

(7) See 8 East, 134. 1 T. R. 252. 1 Taunt. 227. Selw. N. P. 925.

Form and construction of.

the insured will be entitled to recover against the underwriter as for a loss by barratry; and such acts being in violation of that duty, which the masters and mariners owe to the shipowners, the circumstance of the master or mariners conceiving that they were acting for the benefit of the owners will not vary the case. Hence where the master, under letters of marque, which for want of a certificate were not valid, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising, had cruised for and taken a prize contrary to his owner's instructions, in consequence whereof the vessel was lost; it was holden to be an act of barratry, although the master had libelled the prize in a proper court, for the benefit of the owners as well as himself. (1)

Neither is it necessary, in order to constitute barratry, that the master should derive, or even intend to derive, any benefit from the act done, though his deriving a benefit is in general *prima facie* evidence of his fraud; therefore where the master sailed out of port, without paying the port duties, whereby the ship was forfeited, it was holden to be barratry (2). A shipowner cannot recover for a loss occasioned by an act of barratry, which he has not used ordinary diligence to prevent. (3)

Barratry can only be committed by the master and mariners, by some act contrary to their duty, in the relation they stand to the owners of the ship; therefore an owner himself cannot commit barratry, nor can it be committed with his consent (4): thus, if a ship is engaged to carry goods straight to Marseilles, but instead of going thither direct, she goes first to Genoa and Leghorn, this being done by the authority of the owner and for his benefit, it is not barratry (5). Where the master of a vessel, condemned for a breach of blockade, swore he was bound for the other destination; it was held that this did not so disaffirm his owner's privity and consent to the breach of blockade, as to enable the plaintiff to recover as for a loss by barratry (6). If the master be also owner, even although he has mortgaged the

(1) 6 T. R. 379.

(2) 8 East, 135, 136.

1 Taunt. 227.

(3) 1 Camp. 434.

(4) Stra. 1173. 1 T. R. 323.

See Sed vid. 3 Camp. 94.

(5) 2 Stra. 1173.

(6) 6 Taunt. 375. S.C. 2 Marsh.

ship, he cannot commit barratry, and the same rule holds in equity (1). But the term owner, for this purpose, not only comprehends absolute owners, but owners *pro hac vice* only, as general freighters; hence, if a ship is let out to freight generally, the freighter being considered as the owner for that voyage, a deviation with a fraudulent intent, without the consent of the freighter, will be barratry, though with the consent of the original owners (2); and if the owner of a vessel fully laden by the freighters collude with the captain to run her on shore, it was held that this amounts to barratry, although by the terms of a charterparty entered into between such owners and the freighters, the former was entitled to put goods on board during a previous part of the voyage (3). So on the other hand, where the insurance is made by and in favour of the shipowner, and the barratrous act is committed with the privity of the freighter, the underwriter is not discharged, unless he can shew that the shipowner was also privy to the barratry (4). But in all these cases the sailors can commit barratry if against the owner's consent. Proof of the master having committed barratry is *primâ facie* evidence to entitle the plaintiff to recover, without shewing negatively that the master was not owner or general freighter. If the underwriter insists on this as a defence, it is incumbent on him to shew that the master was also owner or general freighter. (5)

Form and construction of.

No fault of the master or mariners amounts to barratry, unless it proceed from a fraudulent or criminal intent; therefore a deviation, if made through ignorance, unskilfulness, or any other motive which is not fraudulent, although it will avoid the policy, does not amount to barratry (6); so a desertion by the crew, for the sake of preserving their lives, from a wreck, &c., is no barratry (7). A deviation, occasioned by the disobedience of seamen, and their compulsion of the captain, has been held not to amount to barratry, where not done with an intent to defraud the owners (8); and yet where a captain cruised in

(1) 4 T. R. 33. Postlethwaite's Dict. 147. Montefiore, *id.* tit. Insurance.
 (2) Cowp. 143.
 (3) 1 Moore, 373.
 (4) *Boutflower v. Wilner*, London Sittings after T. T. 21 Geo. 2.
 2 Selw. N. P. 928.
 (5) 4 T. R. 33.
 (6) 7 T. R. 505. 8 East, 139.
 1 Stark. 240.
 (7) 2 B. & A. 513.
 (8) 2 Stra. 1264.

Form and construction of.

quest of prize, contrary to his orders, this was deemed barratry, though supposed by him to have been done for the benefit of the owners. (1)

It is not necessary that the loss, in consequence of the barratry, should happen in the very act of committing the barratry, it is sufficient if it happen at any time afterwards, and before the voyage insured is completed, but it must happen during the voyage insured and within the time limited by the policy; for where the master, in the course of the voyage, committed barratry by smuggling on his own account, by hovering and running brandy on shore in casks under sixty gallons, and the ship afterwards arrived at the port of destination, and was there moored at anchor 24 hours in safety, after which she was seized by revenue officers for the smuggling, it was holden that the underwriter was discharged. (2)

It has been observed, by a late very learned judge (3), that "it is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between them, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the underwriters; so, however, it is, that this description of loss has, from the earliest times, held its place as a subject of indemnity in British policies of insurance."

Loss by fire.

6th. *By fire.* A loss by fire, which is merely accidental, and not imputable to the master and mariners, is undoubtedly within the meaning of the policy; and in an action on a policy on ship, by which, amongst other risks, the underwriters insured against fire and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners (4). If a ship be burnt by order of the state where she happens to be, to prevent infection, this also has been held a

(1) 6 T. R. 379.

8 East, 134.

(2) 1 T. R. 251.

(4) 2 Barn. & Ald. 73. 5 B. &

(3) Per Lord Ellenborough, A. 171.

loss within the policy (1). If a ship be attacked by an enemy, and the captain, unable to defend her, leave and set fire to her, to prevent her falling into the enemy's hands, the insurers will be liable as for a loss by fire (2). In questions on policies of insurance, the course has always been to ascertain the custom of merchants; and it is an universal and well-known usage for China ships to carry and place their tackle in a warehouse on Bank Saul in Canton river, and the insurers on a ship will be liable for a loss happening to her tackle by fire on this Bank Saul (3). If a fire arises on board a ship from the damaged quality of the goods insured, the underwriters are not liable; but if the loss is not so occasioned, the policy will not be violated by the non-disclosure of the condition of the goods to the insurer (4). Damage without combustion, occasioned by overheating a thing, is not a loss by fire. (5)

Form and construction of.

7th. *By other losses.* This, as before observed, is a very comprehensive term, and includes every species of risk to which ships and goods are generally exposed. A ship insured, and sunk in consequence of a British ship firing on her by mistake, is a loss within this part of the policy (6). Where a merchant ship was taken in tow (by mistake) by a British ship of war, and was thereby exposed to a tempestuous sea, which injured the goods on board her, this was held a loss by perils of the sea (7). The throwing goods overboard from fear of capture by an enemy is also a loss within the meaning of this part of the policy, for which the insured may recover (8). So a loss occasioned by a ship's being driven on one side by a sudden gust of wind, whilst she was in a graving dock, was within the meaning of these general words. (9)

By other losses in general.

In the event of a shipwreck or other misfortune, the effects saved continue, till abandonment, the property of the insured, who is bound in justice and honour to use his best endeavours to rescue them from destruction; to enable him to do this, our policies provide, that in case of any loss or misfortune the

6th. Other usual contents.

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- (1) Montefiore, tit. Insurance. M. T. 57 Geo. 3. Selw. N. P. 930. 1 Stark. 138. 5 M. & S. 461.
 (2) 1 Camp. 123.
 (3) 1 Burr. 341.
 (4) 3 Camp. 133.
 (5) See 4 Camp. 360. Holt.
 C. N. P. 126. 6 Taunt. 436.
 (6) Cullen v. Butler, B. R. 2 B. & A. 315.
 (7) 1 Stark. 157.
 (8) 3 B. & A. 398.
 (9) 5 B. & A. 161. See also

Form and construction of.

insured, their factors, servants, and assigns, shall be at liberty to sue and labour about the defence, safeguard, and recovery of the goods and merchandizes, and ship, &c., and they contain a stipulation to bear a due proportion of the expence, without prejudice to the right of abandonment, which we shall hereafter consider. This establishes that till the insured have received advice of the loss, no act of the captain shall prejudice their right to abandon. From the nature of his situation, the captain has an implied authority, not only from the insured, but also from the insurers, and all others interested in the ship or cargo, in case of misfortune, to act according to his discretion for the benefit of all concerned, and they are all bound by his acts (1). For whatever is recovered of the effects insured, the captain is accountable; if the insured neglect to abandon when he has it in his power to do so, he adopts the acts of the captain, and is bound by them; if, on the other hand, the insurers, after notice of abandonment, suffer the captain to continue in the management, he becomes their agent, and they are bound by his acts. Sailors are bound to assist in saving and preserving the ship and merchandize when a misfortune happens, and while they are so employed, they are entitled to wages so far at least as what is saved will allow; but if they refuse to assist, they shall have neither wages nor reward. (2)

Under this stipulation the insured may recover for any contribution they have made, or any expence they have incurred for general average and salvage, which subjects we have before briefly considered (3). The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended, and labour bestowed about the defence, safeguard, and recovery of the ship, to a much greater amount than the subscription, and it shall be recoverable as an average loss. (4)

The policy then proceeds to state the usual acknowledgment of the receipt of the sum paid as a premium, which acknowledgment, however, does not appear to be conclusive upon the under-

(1) Doug. 219.

(2) As to this point, and the difference between a sailor and a passenger, 3 B. & P. 612. Peake,

C. N. P. 72.

(3) See ante, 433. 440.

(4) 4 Taunt. 367.

writers (1). There is no fixed rule to ascertain the rate of the premium in any case. This must always depend on the agreement between the parties, and therefore the premium, whatever it may be, is always reputed to be just and fair, if there be no fraud or surprise on either side. If the nature of the risk be fairly and fully declared by the insured, the insurer cannot dispute the payment of a loss on the ground of the smallness of the premium. (2)

Form and construction of.

The manner in which the insurer or underwriter binds himself by the policy is merely by writing, by himself or his agent, in one line at the foot of the policy, the sum which he engages to insure, and to pay in case of loss, with his name, or frequently only the initials of it, and the acknowledgment of the receipt of the premium. It is usual, though not essentially necessary, to specify the sum insured, and the mode of doing this is by writing the sum in words, and not in figures, in order to prevent any alteration being made.

7th. The subscription and date.

Regularly the policy should be dated (3), that is, to each subscription, for each subscription makes a distinct contract; the day on which, and the month and year in which it is made ought to be added; the insertion of a date may tend to the discovery of a fraud, and consequently ought not to be omitted.

It may be as well here observed, that a policy must be issued within three days after the insurance is made, under a penalty for not issuing it (4); and therefore, although it is usual, before the policy is formally filled up, to make a minute of the insurance with the initials of the persons who agree to insure, that memorandum is not, in general, of any legal efficacy. (5)

Next follows the usual memorandum, which is introduced to prevent litigation about trivial losses, and losses arising from the perishable quality of some description of goods. The memorandum is usually to the following effect: "N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average unless general, or the ship be stranded; sugar, tobacco, hemp, flax,

9th. Memorandum.

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- (1) 3 Taunt. 493. 497. n. (3) Marsh. 241.
 4 Taunt. 246. 6 Taunt. 110. (4) 11 Geo. 1. c. 30. s. 44.
 2 Chit. Repts. Sed vid. 1 Camp. 35 Geo. 3. c. 63. s. 11.
 532. Park, 34. (5) 3 East, 572. Rogers v.
 (2) Montefiore's Dict. tit. Ins.. M'Carthy, Park, 45. n. a.

Form and construction of.

hides, and skins, are warranted free from average under five pounds per cent.; and all other goods, also the ship and freight, are warranted free of average, under three pounds per cent., unless general, or *the ship be stranded*." The words in italics have been omitted for several years in the forms of policies adopted by the two insurance companies, viz. the London Assurance and Royal Exchange Assurance. The word corn in this memorandum comprehends peas (1) and malt (2), but not rice (3). The word salt does not comprehend saltpetre. (4)

By virtue of this memorandum the insurer is not bound to make good any average or partial loss upon the articles specified in the memorandum, except a general average, or unless the ship be stranded. We have already considered as to what will constitute a general average loss (5). The underwriter is liable for an average loss upon the articles specified in the memorandum where there is a stranding, although no part of the loss happen in consequence of the stranding, provided such average loss arises from one of the perils insured against (6). When a ship is stranded, the underwriters in general agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained (7). To constitute a stranding, it is essential that the vessel should go on the strand from an accident, and out of the ordinary course of the voyage, and be stationary. The striking on a rock, where the vessel remains for a minute and a half only, is not a stranding, though she thereby receives an injury which eventually proves fatal (8); but where a vessel struck upon a rock, and remained fixed there for the space of fifteen or twenty minutes, in consequence of which she sustained an injury, it was held to be a stranding (9). Where during the course of a voyage upon an inland navigation it became necessary, in order to repair the navigation, to draw off the water, and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles which were not previously known to be there; it was held that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordi-

(1) Marsh. 143.

(2) 2 Esp. 633.

(3) 2 Bos. & P. N. R. 213.

(4) Park, 179.

(5) See ante, 433.

(6) 3 Burr. 1553. 7 T. R. 210.

(7) 4 T. R. 787.

(8) 1 Stark. 130.

(9) Id. 436. See Park, 177.
7 ed. 4 Camp. 283.

nary course of such voyage (1). So where a ship, being under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, and contrary to the usual practice, and out of the usual place, fastened at the pier of the dock bason by a rope to the shore, and left there, and she took ground, and when the tide left her, fell over on her side and bilged; in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged, it was held that this was a stranding to entitle the assured to recover for an average loss upon the goods (2); and the assured will not be prevented from recovering against the underwriter an average loss upon a damage by stranding, occasioned by the neglect of a Liverpool pilot appointed under the 37 Geo. 3. c. 78., while the ship is under his conduct (3). But where a vessel, being under the conduct of a pilot in going up a harbour, took the ground in the ordinary course of navigation, and afterwards, being moored at a quay on the ebb of the tide, took ground, fell over on her side, and was injured, and her cargo damaged; it was held that this was not a stranding for which the insurer was liable (4). Where there is neither general average nor stranding (5), it seems that the underwriter is not liable at all, if the commodity specifically remain, although the damage sustained may amount to a total loss. Sometimes a special clause is inserted in the policy, that the underwriter shall be bound to pay average separately on each particular marked package; this stipulation does not preclude the assured from recovering an average loss upon the whole, exceeding three per cent. under the usual memorandum in the policy, and in such case, though several packages remain uninjured, they are to be included in the general average (6). The Royal Exchange company is liable for a total loss upon a cargo of wheat, where the ship from the perils insured against becomes incapable of pursuing her voyage, and another vessel cannot be procured to forward the cargo. (7)

Form and construction of.

The contract of each underwriter under a policy of insurance is separate and not joint, and consequently, in case of litigation, separate actions must be commenced against each, though it is usual, when the same point is to be tried in each action, for the

General observations on the nature, effect, and construction of a policy of insurance.

(1) 5 B. & A. 225.

(2) 4 M. & S. 77.

(3) *Id.*

(4) 1 Brod. & B. 388. 4 Moore,

(5) Park, 191. 181. Marsh. 144.

(6) 1 Stark. 157.

(7) 2 Camp. 623, 624. n.

2 M. & S. 240.

General observations,
&c. on.

parties to enter into a consolidation rule, by which all parties agree to be bound by the result of one trial, and the determination in one action. This instrument has always been considered the worst framed of all the contracts that ever became the subject matter of litigation in our courts of justice. It has been said (1), that "it is wonderful, considering how much property is at stake upon instruments of this description, that they should be drawn up with so much laxity as they are; and that those who are interested should not apply to some man whose habits of life and professional skill will enable him to adapt the words of the policy to the intention professed by the parties. In construing the instruments, we must always look for what was the intention of the parties, without confining ourselves to a strict grammatical construction; for it is impossible, in many instances, so to construe them without departing widely from the object intended. Thus we find, that a policy meant to cover a risk on goods only, will have words relating, for the most part, to an insurance on the ship, to which it would extend but for some loose memorandum, and a policy meant to cover *respondentia* interest, will contain no mention of *respondentia* except in the margin." It must, however, be observed, that the various decisions upon the different parts of this instrument are now so complete and clear, that the import of each term is now well known; and probably if a new instrument were to be framed in a more grammatical shape, it might produce more uncertainty and confusion, and consequent litigations, than is at present experienced.

With respect to the construction of this instrument in general, in *Robertson v. French* (2), Lord Ellenborough has laid down the following clear and satisfactory rule. In a case, his lordship said, "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance, which are not equally applicable to the terms of other instruments, and in all other cases. It is therefore proper to state, upon this head, that the same rule of construction which applies to all other instruments, applied equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected, in the first place, from the terms

(1) By Mr. J. Lawrence, in *Burr.* 555.
3 East, 578. See also 4 T. R. 210. (2) 4 East, 135.

used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired, by use and practice, a known and definite meaning, and that the words superadded in writing, subject, indeed, always to be governed, in point of construction, by the language and terms with which they are accompanied, are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms, selected by the parties themselves for the expression of their meaning, and the printed are a general formula, adapted equally to their case and that of all other contracting parties, on similar occasions and subjects." (1)

General observations, &c. on.

A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be either affirmative, as where the insured undertakes for the truth of some positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she sailed or was well on such a day, &c.; or it may be promissory, as where the insured undertakes to perform some executory stipulations, as that a ship shall sail on or before some given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c. (2)

Of warranties in the policy in general.

Warranties are either express or implied. An *express* warranty is a particular stipulation, introduced into the written contract, by the agreement of the parties; as that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy, &c. An express warranty being of the nature of a condition precedent, the courts have held, that it must appear on the face of the policy, in order that

(1) See also 1 Burr. 341.

(2) Montefiore, tit. Insurance.

Warranties in,
in general.

there may be indisputable evidence of a stipulation, the non-compliance with which must necessarily avoid the contract. Instructions in writing, therefore, for effecting the policy, unless inserted in the instrument itself, do not amount to a warranty (1). Even a paper wafered to a policy will not make it a warranty (2), but it will be sufficient if it be written in the margin. An *implied* warranty is that which reasonably results from the nature of the contract, as that the ship shall be seaworthy when she sails on the voyage insured, that she shall be navigated with reasonable care, that the voyage is lawful and shall be performed according to law and in the usual course, without deviation, &c.

A warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words (3). The breach of the warranty, therefore, consists in the falsehood of an affirmative, or the nonperformance of an executory stipulation. In either case the contract is void, and whatever it may be, or whether a loss proceed from the breach of it or not, the insurer is not liable (4). It is also immaterial to what cause the noncompliance is attributable; for if it be not in fact complied with, though perhaps for the best reason, the policy is void. Therefore, if a ship be warranted to sail on or before a given day, and she be prevented by any accident, as the sudden want of repair, the appearance of an enemy, &c., from sailing, though it may be right in such case not to sail on the day, yet the warranty is not complied with, and there is an end of the policy. (5)

What fraud or
concealment will
vitiare a policy.

Good faith should preside in all the transactions of commerce, and in none more than those of insurance. In this contract each party is bound to conduct himself towards the other not only with integrity, but with the most unreserved openness and candour, and they ought mutually to disclose to each other every circumstance which can in any degree affect the risk. (6) A representation in insurance is denoted to be a collateral statement, either by parol or in writing, of such facts or

(1) Cowp. 790.

(2) Dougl. 12, 13.

(3) Hyde v. Bruce, B. R. H. T.
23 Geo. 3. Montefiore, tit. Ins.

(4) 1 T. R. 343.

(5) Cowp. 784. Park, 326.

(6) Park, 7 ed. 283.

circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the insurer, to enable him to form a just estimate of the risk; such representations are often the principal inducements to the contract, and afford the best ground on which the premium can be calculated. A misrepresentation may be made either wilfully and fraudulently, or inadvertently and innocently (1). A misrepresentation in a material point avoids the contract (2), and the insured cannot recover on the policy for a loss arising from a cause unconnected with the fact misrepresented (3). So, if the misrepresentation be made without knowing whether it be true or false, or even if the person making it believe it to be true, it will avoid the policy (4); but if he only give it as his belief, without knowing the contrary, it will not affect the contract (5). For the same reason, if the word *expected* be used, this will not amount to a misrepresentation, if the expectation does not turn out as expected (6). A misrepresentation or concealment by an agent, though without the consent of his principal, is sufficient to avoid a policy (7). It would be an endless task to point out the various decisions which have taken place on this point. They all depend on the facts of each particular case, and are decided upon the above general rules. The material question in all cases to decide whether or not a misrepresentation of a fact will avoid a policy, is whether or not the fact misrepresented was material (8)? A fraudulent untrue representation will avoid a policy in general, though the misrepresentation is not such as affects the nature of the risk. (9)

Fraud or concealment.

There is a material difference between a representation and a warranty. The latter, as we have seen, being a condition on which the contract is to take effect, is always a part of the written policy, and must in general appear on the face of it, whereas a representation is only a matter of collateral information or intelligence on the subject of the voyage insured, and makes no

(1) Montefiore, tit. Insurance.

(2) Park, 307. 312.

(3) Stra. 1183.

(4) See 1 T.R. 12.

(5) 10 East, 415.

(6) Dougl. 292.

(7) 1 T.R. 12. How far a representation made to an underwriter in a policy shall be taken

to extend to subsequent underwriters, see 3 East, 572. 2 Camp. 543. Dougl. 306.

(8) See 1 T.R. 12. 7 East, 367. 11 East, 176. 2 Dow. 263, 7. Dougl. 260. 271. Stra. 1183. As to the effect of misrepresentations in general, see ante, 155, 6, 7.

(9) 2 Dow. 263.

Fraud or concealment.

part of the policy. A warranty being in the nature of a condition precedent, must be strictly and literally complied with, but it is sufficient if a representation be true in substance. By a warranty, whether material to the risk or not, the insured stakes his claim of indemnity upon the precise truth of it, if it be affirmative, or upon the exact performance of it, if executory, but it is sufficient if a representation be made without fraud, or be not false in any material point; or if it be substantially, though not literally, fulfilled. (1)

Concealment.

Concealment, or *suppressio veris*, is nearly allied to misrepresentation or *allegatio falsi*, and consists in the suppression of any fact or circumstance material to the risk; and it is not merely on the ground of fraud that concealment avoids the contract, even concealment which is only the effect of accident, negligence, inadvertence, or mistake, will be equally fatal to the contract as if it were intentional and fraudulent (2). Nor can the insured, by tendering any increase of premium, require the insurer to confirm it; for the insurer has a right to say, that he would not have subscribed the policy upon any terms if he had not been deceived. Every fact and circumstance which can possibly influence the mind of the insurer in determining whether he will underwrite the policy at all, or to what premium he will underwrite it, is material. Therefore, whatever respects the state of the ship, the time of her sailing, the nature of the employ in which she is to be engaged, ought to be fully and explicitly disclosed, and keeping back any fact of this sort will be fatal to the contract, and in such case the concealment so vitiates the policy that it will afford the insured no remedy even for a loss arising from a cause unconnected with the fact or circumstances concealed; for a concealment is to be considered, not with reference to the event, but to its effect at the time of making the contract (3). The underwriter needs not be told what lessens the risk agreed upon, or what is understood to be comprized in the express terms of the policy; he needs not be told what is the result of political speculations or general intelligence (4), and facts only need be disclosed; and it is not necessary to communicate the insured's mere opinion or suspicion

(1) See Montefiore, tit. Insurance. Dougl. 247. (2) 3 Burr. 1905. As to fraudulent concealment in gene-

ral, see 156, 7.
(3) Stra. 1183.
(4) Park, 318.

that a loss has ensued (1). Those things only need be disclosed which the one privately knows, and the other has no reason to suspect. There need be no previous representation as to the state of the ship, that being covered by the implied warranty that she is sea-worthy. Letters, therefore, from the captain, describing the bad state of the ship in her outward voyage, need not be shewn to the underwriters in a policy on a subsequent one (2). Nor is it necessary to state what may reasonably be presumed, or what either party may know (3); nor a circumstance made material by a foreign ordinance, of which he was ignorant (4).

Fraud or concealment.

Loss is either total or partial. A *total loss* may, within the meaning of the policy, arise two ways. 1st. By the total destruction of the thing insured. 2d. By such damage to the thing insured as renders it of little or no value to the insured, although it may specifically remain. Thus a loss is said to be total, if, in consequence of the misfortune that has happened, the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated; or, if the thing saved be of little or no value to the insurer, and when the salvage is very high, or when the value of what is saved be less than the freight; or where further expence is necessary, and the insurer will not undertake at all even to pay that expence (5). A *partial loss* is any thing short of a total loss. Thus, if a ship insured for a particular voyage arrive at her port of destination, and there remain twenty-four hours moored in safety; or if she be insured for a term and survive the term, no injury which she could have sustained during the voyage, in the one case, or during the term in the other, however great, can amount to a total loss. So in the case of an insurance on goods, the insurer contracts that they

Of losses and abandonment.

What a total loss, and of the right and liabilities of the parties to the insurance in case of abandonment.

(1) 6 B. & A.

(2) Park, 296. note (a). 4 East, 590. 3 Taunt. 381. 5 Taunt. 430.

(3) 1 Camp. 503. 505. n. 508. n. 3 Camp. 200. 1 Taunt. 463. 1 Dow. 324.

(4) As to what will amount to such a concealment to avoid a policy, see Stra. 1183. 3 Burr. 1905. 1 Esp. 373. 407. 1 Bos. & P. 672. 7 East. 457. 3 Taunt. 37. 381. 4 Taunt. 493. 2 Camp. 479. 2 B. & A. 320. 6 Taunt. 338.

2 Marsh. R. 46. S. C. 1 M. & S. 15. 35. 4 East, 596. 14 East, 479. 494. 2 P. Wms. 170. 1 N. R. 14. 151. 2 B. & A. 320. 5 Taunt. 363. 1 Marsh. R. 99. S. C. 5 Taunt. 430. 1 Marsh. 117. S. C. 4 Dow. 97. 1 Dow. 324. 4 B. & A. 423. 1 B. & A. 672. 2 Chit. R. 22.

(5) See 2 Marsh. Dougl. 219. 1 T. R. 608. 6 T. R. 425. 2 Taunt. 363. 3 Camp. 440. 2 M. & S. 240. 5 M. & S. 47.

Of abandonment. shall arrive safe at the port of delivery: if they specifically remain, and are landed at the port of delivery, however damaged in the voyage, the injury will only amount to a partial loss, being of the nature of those losses which are the subject of average contributions. Partial losses are sometimes stiled *average losses*.

The insured cannot abandon unless they have done every thing in their power to prevent the loss. Where a ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas, for the mere preservation of their lives, and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port; it was held, that the ship having been sold under the decree of the admiralty court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and there was no more than a partial loss. (1)

The insured cannot abandon upon an illegal transaction, and the illegality of the transaction will frequently be implied from the act of the insured; neither can the insured abandon on a wagering policy. (2)

In the case of a constructive but not actual total loss, the insured is entitled, if he pleases, to call upon the insurer as for a total loss; but then he must abandon, that is, he must *renounce and yield up to the insurer all his right, title, and claim to what may be saved, and leave him to make the most of it for his own benefit*. The insurer then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. The idea of abandonment, therefore, presupposes a total loss in the latter sense, and implies that something remains which may be saved, and which may be given up or abandoned to the insurers; for if the insured could only abandon in the case of a total loss, in the strict and natural sense of the words, there would be nothing to abandon, and abandonment could then be only an useless form. If the insurance be entire, the insured cannot abandon for part only; but if the

(1) 2 Barn. & Ald. 513. 2 (2) 1 T. R. 304.
Maul. & Sel. 290.

same person insures his goods by different policies, or if in the same policy they be separately valued, he may abandon any separate part and retain the rest, or he may abandon either ship or cargo if separately valued, but not if insured for one entire sum (1). The insured is not in any case bound to abandon (2); but if he do so he must give due notice of his determination; and if he does not in fact abandon, or neglects to do so effectually, or if, on being required by the underwriter to assign over his interest in the property assured, he refuses to do so (3), he will not be entitled to claim as for a total, but in general only for a partial loss, unless in the conclusion there be a total loss (4).

The insurers in general are bound to accept a proper abandonment, and if they refuse to do so they will still be in effect liable as if they had accepted it; and if by any interference of the underwriters the assured are actually prevented from abandoning, the former will still be liable. If the insured, hearing that his ship is much disabled and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured (5). It should seem that the insurers are not bound to accept an abandonment in the case of a capture or detention by pirates, &c., or in such cases where a *spes recuperandi* exists (6). If an insurer rejects an abandonment, he must do so within a reasonable time, or he will be liable as if he had accepted it; and in a case where the underwriters did not stir for more than two months after the notice of abandonment, they were considered as having acquiesced in it, and by acquiescing in an abandonment the insurers in general admit the loss to be total (7). If the underwriters demand an abandonment of more than they have insured, this need not prevent the insured from abandoning to the amount of the sum insured (8). To render the insurers liable, as upon an abandonment, there must be an actual intention of the insured to aban-

(1) Montefiore, tit. Insurance.

(2) 15 East, 15.

(3) 8 T. R. 268.

(4) 15 East, 13.

(5) 2 Term Rep. 407.

(6) See 5 B. & A. 421. & post.

518, 520.

(7) 3 Brod. & B. 97.

(8) 8 T. R. 268.

Of abandonment. **don**, as well as an actual abandonment, unless the insurers refuse to accept it. Where a ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea peril, and the owner did not abandon, but merely applied to the underwriters for directions how to proceed upon an estimate of the expences of repair, who declined interfering, it was held he could not afterwards convert this partial into a total loss, on account of the expences of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress, though the sale was directed by the assured to be made on account of all concerned: (1)

We will now consider, 1st, What will amount to such a loss as not to require an abandonment to entitle the insured to recover. 2dly, In what cases the insured may abandon, and when an abandonment is necessary. 3d, In what manner an abandonment should be made, and what will amount to one. And 4thly, The effect of an abandonment.

What will amount to a total loss, so as to entitle the insured to recover without an abandonment.

Abandonment, when necessary.

1st. *What will amount to a total loss, so as to entitle the insured to recover on a policy without an abandonment.* If there has been a total destruction of the thing insured, it is scarcely necessary to observe that the insured are liable within the meaning of the policy to the full amount of the sum insured, without any actual abandonment on the part of the insured. Freight is insured from A. to B.; the ship sails, but is obliged to put back from stress of weather, when she is found to be incapable of complete repair, and the cargo is accordingly unloaded, and the ship sold; in an action on the policy for a total loss, it was held that there was no necessity for an abandonment of the freight, but that the insured was bound to use all reasonable endeavours to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage (2). Freight was insured on ship and cargo of timber from Quebec to London; the ship sailed from Quebec, and on her voyage down the river St. Lawrence sprung a leak, and it became necessary for the preservation of the lives of the master and crew to run her on shore; she took the ground on the outside of a reef of rocks, and was there fixed and exposed to

(1) 14 East, 465.

(2) 1 Marsh; 447. S.C. 6 Taunt. 68.

the full force of the stream, and in the way of the drift ice then forming and floating down the river. One of the part owners and agent for the others resided at Quebec, and after two surveys, in which the surveyors stated as their opinion, that it would be prudent to sell the ship and cargo, the master, under the direction of such part owner, sold the same; the ship however survived, was repaired by the purchasers, and afterwards brought a full cargo to London. In an action on the policy against the underwriters on freight for a total loss, it was held that an abandonment of the freight was unnecessary (1). An American properly licensed to export saltpetre from Calcutta to America, having insured it for the voyage, the ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold by order of the court of admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs; it was held that the assured might recover as for a total loss without notice of abandonment, the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there, and that such loss was recoverable against the underwriters on a count alleging it to have happened by the unlawful seizure and detention of a British ship of war, and that the court of appeal allowing the captor his costs on the reversal of the sentence of condemnation did not the less shew the original seizure and detention to be unlawful as alleged in the count. (2)

So if there have been such a loss as would entitle the insured to abandon, but he omits to do so, or make an ineffectual abandonment, and there arise a subsequent total loss by entire destruction, the insured may recover without abandonment (3). Where in an insurance on goods the vessel was wrecked, part of the goods lost, and part got on shore, but (whilst on shore) were destroyed and plundered by the inhabitants of the Isle of France, so that no portion of them came again into the possession of the assured, it was held that this was a total loss by perils of the sea, and no abandonment was necessary (4). If there be an

(1) 3 Moore, 115.

(3) 15 East, 13.

(2) Mullett v. Shedden, 13 East, 304.

(4) Holt. C. N. P. 149.

Of abandonment. actual loss by entire destruction, the circumstance of the assured having previously given an ineffectual notice of abandonment will not prejudice his claim (1). And where the assured of goods having received intelligence on the 8th of January 1811, that the ship's papers were taken away on the 7th of December preceding by the Swedish government, within whose port she was, did not give notice of abandonment to the defendant underwriter till the 17th of January, but though such notice was too late, supposing an abandonment to be necessary, yet as the goods were finally seized and unladen by orders of that government on the 30th of April following, it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss without any abandonment. (2)

In what cases an insured may abandon, and where an abandonment is necessary.

2d. *In what cases an insured may abandon, and where an abandonment is necessary.* It may appear superfluous to enter into the very many cases which have been brought forward on the subject, as to what will amount to such a loss as to entitle the insured to abandon; as no general rule however can be laid down, further than the above, it may be most advisable to look into the facts of the most important cases which have been decided on this subject, and from which the law can be better collected than the laying down of any general position. It may be as well here to remark, that a party can in no case abandon where he does not all in his power to prevent the loss. (3)

Shipwreck is generally a total loss. What may be saved of the ship or goods is so uncertain, and depends so much on accident, that the law cannot distinguish this from the absolute destruction of the whole; the wreck of the ship may remain, and may be saved, but the ship is lost. A thing is said to be destroyed when it is so broken, disjointed, or otherwise injured, that it no longer exists in its original nature and essence; so the goods may remain; but if no ship can be procured in a reasonable time to carry them to their place of destination, the voyage is lost, and the adventure frustrated. But mere stranding is not of itself

(1) 15 East, 13. *Brotherston v. Barber*. B. R. M. T. 57 Geo. 3. 13. Selw. N. P. 938. 10 East, 329. (2) *Mellish v. Andrews*, 15 East, 13. (3) 2 B. & A. 513.

deemed a total loss, so as to entitle the insured immediately to abandon. If by some fortunate accident, by the exertions of the crew, or by any borrowed assistance, the ship be got off and rendered capable of continuing her voyage, it is not a total loss, and the insurers are only liable for the expences occasioned by the stranding; it is only when the stranding is followed by shipwreck, or in any other way renders the ship incapable of prosecuting her voyage, that the insured is entitled to abandon. (1) Of abandonment.

It is also a rule, that to entitle the insured to abandon there must be at some period of the voyage insured, or during the continuance of the risk, a total loss; and the following cases will shew that no *partial* loss, however great, occasioned by the perils of the sea, can be turned into a total loss. Thus, where (2) an insurance was made on the ship *Friendship*, from *Weyburgh* to *Lyons*, the ship arrived, but had been so much damaged in the voyage as not to be worth repairing, it was held, that though the damage was at the rate of £48 per cent., the owner could not abandon; and it was said, that “nothing can be better established, than that the owner of a ship can only abandon in the case of a total loss happening at some period or other of the voyage; the true way of considering this case is, that it was an insurance on the ship for the voyage, and if either the ship or the voyage be lost it will be a total loss, but here neither was lost.” If by any accident or misfortune the ship be prevented from proceeding on her voyage, and the voyage be thereby lost, this is a total loss, not only of the ship and freight, but also of the cargo, if no other ship can be procured to carry it to its port of destination, but if such other ship could be procured it would be otherwise, if *pro rata* freight could be recovered (3). In a policy of assurance on goods (copper and iron) at and from *L.* to *Q.* warranted free of particular average, and the ship, owing to sea damage, in the course of her voyage was obliged to run into port and undergo repair, and some part of the goods were damaged, and the repairs detained her so long as to prevent her reaching *Q.* that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage, it was held that

(1) Vide Emerig. tom. 2. p. 180. (3) Park, 169.

(2) 1 T. R. 187.

Of abandonment. this was not a total loss of the goods, and that the assured could not abandon (1). And a loss of voyage for the season by the perils of the sea is not a ground of abandonment upon a policy on goods, with a clause of warranty free from average, where the cargo is in safety, and not of so perishable a nature as to make the loss of the voyage a loss of the commodity (2). Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured, it was held that the underwriters on the goods, who were freed by the policy from the particular average, could not be made liable as for a total loss by a notice of abandonment (3). Upon a policy of insurance on flax, valued at so much, and warranted free of particular average, if the vessel be wrecked, and the assured do not abandon, but labours to save the cargo, and in fact saves a part (one sixteenth), though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest, which was saved to them in specie, though deteriorated. (4)

Capture by an enemy or a pirate is *prima facie* a total loss; and immediately upon the capture, or upon a mere arrest, or at any time while the ship continues under detention, the insured may elect to abandon, and give notice to the insurer of his intention to do so, and thus entitle himself to claim as for a total loss from the insurer, provided the insurers accede to the abandonment, for from the moment of the capture the owners *prima facie* lose their power over the ship and cargo, and are deprived of the free disposal of them; and in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, is equivalent to a total *deprivation*. It would therefore be unreasonable to oblige the insured to wait the event of recapture (5). But a capture or arrest does not necessarily and at all events terminate in a total loss, so as to entitle the insured to abandon, for as he cannot abandon till he has received notice of the loss, if at the time he receives such advice, or before he has elected to abandon, he receive advice that the ship or goods insured are recovered, or are in safety, he cannot then abandon, because he

(1) 2 Maule & Selw. 240.

(2) 5 M. & S. 47.

(3) 16 East, 214.

(4) 15 East, 559.

(5) 2 Marsh, 484.

can only abandon while it is a total loss, and he knows it to be so, not after he knows of the recovery; therefore, if a captured ship be retaken and permitted to proceed on her voyage, so that she suffers but a small temporary inconvenience, this would only be a partial and not a total loss (1). And therefore, where a ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days, and the insured having received intelligence of the recapture, and that the ship was safe in the possession of the recaptors in a port of Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment, but the ship was afterwards restored to his possession without damage, and arrived at Liverpool and earned her freight, this salvage and the charges of the recapture amounting only to £15. 4s. 8d. per cent.; held that he was not entitled to abandon, it appearing in the result, that at the time when the notice of abandonment was given it was in fact only a partial and not a total loss, as the assured supposed, and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss (2). Where there was a loss by capture, intelligence of which was received, and an abandonment made, and a recapture took place before the notice of abandonment was given, but there was no intelligence received of such recapture until after some steps had been taken by the underwriters, it was held to amount to an acceptance of the abandonment by them (3). However, a title to restitution upon a recapture does not necessarily and at all events deprive the insured of the right to abandon, or if in consequence of the capture the voyage be lost, or not worth pursuing, if the salvage be very high, if further expence be necessary, and the insurer will not undertake at all events to pay it, he may abandon (4); so if after a recapture an embargo be laid on the ship the assured may abandon (5). An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated, so as to become an average loss, only by the mere restitution and return of the ship's hull before action brought, if the restitution be under such condition as to make

Of abandonment.

(1) 2 Burr. 683.

(2) 10 East, 329.

(3) 2 Dow. 474.

(4) 2 Burr. 1198. Dougl. 219.
4 M. & S. 576.(5) 6 T. R. 413. 5 M. & S.
447.

Of abandonment. it uncertain whether the assured may not have to pay more than its worth; as where a ship insured from Liverpool to Sierra Leone was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and was carried to Fayal, where proceedings were instituted in the admiralty court, and sentence was pronounced in favour of the assured, but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept, and afterwards the remainder of her cargo was sold at Fayal, and the law expences paid thereout, and the rest left as a deposit to answer the event of the appeal, in order to obtain the release of the ship, and afterwards the ship returned to Liverpool, it was held that the assured might recover for a total loss, in an action brought after the ship's return to Liverpool. (1)

If an insurer refuse to accept an abandonment upon the capture of a ship, and after the refusal the ship be recaptured, he will not be liable as for a total, but only a partial loss (2). And where an insurance was made on a ship from Rio de Janeiro to Liverpool, and the ship was captured and afterwards recaptured, but in the interval the assured, having received intelligence of the capture, gave notice of abandonment, which the assurers did not consent to, and after the recapture the ship arrived at Liverpool, having sustained a partial damage, it was held the insurers were only liable for a partial loss. (3)

An arrest of princes, or other detention, such as an embargo, *prima facie* will entitle the insurer to abandon for a total loss; and the same rules, as govern in the cases of capture on this subject, will be here applicable. Where a neutral ship, bound from America to Havre, was detained and brought into a British port, and pending proceedings in the Admiralty the king declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited, this was held a total loss of the voyage, which entitled the neutral assured to abandon (4). But a foreigner, insuring in this country his ship or

(1) 4 Maule & Selw. 576.

(2) 4 M. & S. 393.

(3) 5 M. & S. 418.; see a
2 Burr. 1198. 1 Black. R. 276.

(4) 9 East, 283.

goods on a voyage, is not entitled to abandon on an embargo Of abandonment. laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act; and goods having been consigned by such foreigner on his own account and risk to British merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums, and the goods were afterwards abandoned in consequence of such embargo, it was held that, as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear, however they might have insured their separate interests by a policy made on their own account (1). Where a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss, for the property in the ship is not divested out of him (2). The loss of the voyage, occasioned by the detention of the ship, will not enable the owner to recover on the policy on the ship for a total loss, the ship having been released before abandonment (3). Upon a hostile embargo in a foreign port, the owner, who had separately insured ship and freight, abandoned them to the respective underwriters, which was accepted by them, after which the embargo was taken off, and the ship completed her voyage and earned freight: it was held that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured in making such document (4). A vessel chartered to Oporto, St. Ube's, and Gottenburgh, being taken at Oporto by the enemy, was liberated, on payment by the master of a sum of money, and on condition of his bringing home in her to England English prisoners to be exchanged for an equal number of French: upon the news of the capture, but after the time of

(1) 10 East, 536.

(3) 2 Taunt. 363.

(2) 1 Marsh. 425. S.C. 6 Taunt.

(4) 3 East, 388.

Of abandonment. the ship's liberation, the owners abandoned the ship to the insurers : upon her arrival at Portsmouth, the captain refused to deliver her, unless on repayment of the ransom, which the owner refused : and the Court of Common Pleas held that the owner, being entitled to retake his ship, which was safe at Portsmouth, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover as for an average loss, the sum which had been paid by the master for the ship's ransom, and which being an illegal payment, the plaintiff was not bound to repay to the master (1). Sometimes, upon the detention of a vessel by a foreign power, the insurers pay the amount of their subscription, upon an undertaking that if the property shall be restored, the insurers shall be placed in the same situation, and no actual abandonment is made ; if the property be afterwards restored, but during the detention was injured, yet this subsequent restoration will be considered a sufficient compliance with the undertaking. (2)

Barratry will in general constitute a total loss, so as to entitle the assured to abandon. It has been questioned how far the assured may abandon, on an act of *barratry* being committed during the voyage, as by smuggling, subjecting the vessel to forfeiture (3). Where a ship and cargo was barratrously taken out of the course of her voyage by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel ; it was held that this was a total loss of the cargo, from the time of the committing the act of barratry (4). So in an insurance on a slave ship and cargo, " at and from Liverpool to the coast of Africa, &c., and from thence to the West Indies and America," when immediately on the ship's arrival on the coast the crew met, and whilst the master was ashore, took possession of her, and set sail for an enemy's port ; but the boatswain, to whom the management of the ship was confided, steered for Barbadoes, where the ringleaders were seized, and some of them executed : part of the stores and outward cargo having been embezzled by the crew, and the remainder sold by the government agent at Barbadoes for the benefit of all concerned : it was held that, under these cir-

(1) 2 Taunt. 363.

(2) 1 Stark. 6.

(3) 1 Term Rep. 252.

(4) 5 B. & A. 597.

cumstances of utter dilapidation and loss of the voyage, the assured were entitled to abandon and recover as for a total loss (1). So in an insurance on a ship, and the ship during her voyage, while loading her homeward cargo, was seized by the crew, and carried away to a distant country, and her cargo plundered and the ship deserted, but was afterwards retaken by another ship, and was brought, with a small remaining part of her cargo, to an English port (not the port of her destination), and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expence in providing a crew and stores: it was held that this was not a total loss, so as to entitle the assured to abandon, after notice of recapture (2). Where a ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas, for the mere preservation of their lives, and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port: it was held that such desertion of the crew did not of itself amount to a total loss; and that the ship, having been sold under the decree of the Admiralty Court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss. (3)

Of abandonment.

3d. *In what manner an abandonment should be made, and what will amount to an abandonment.* As soon as the insured receives advice of a loss which entitles him to abandon, he must make his election whether he will abandon or not, and if he determines to abandon, he must give the underwriters notice of this within a reasonable time after the intelligence arrives, and any unnecessary delay in giving this notice will amount to a waiver of his right to abandon; for, unless the owner does some act signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage (4). He must make his election speedily, whether he will abandon or not, and put the underwriter in a situation to do what is necessary for the preservation of the property, whether sold

At what time and in what manner an abandonment should be made, and what will amount to an abandonment.

(1) Dow. 349. (Scotch).

2 M. & S. 290.

(2) 2 Maul. & Selw. 290.

(4) 1 T. R. 608. Park, 228,

(3) 2 B. & A. 513. See also &c. 2 Marsh. 508.

Of abandonment. or unsold. "He cannot," as it has been said, "lie by and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them (1)." But the assured is entitled to a reasonable time for acquiring a full knowledge of the state of a damaged cargo, before he is bound to elect whether he shall abandon (2). Therefore, where a ship bound from Liverpool to Calais put back to Liverpool on the 20th of December, when the cargo, consisting of sugar, was immediately relanded and surveyed, the owners in London received a letter from their agents at Liverpool, dated 29th December, stating that the cargo was much damaged, but that it was still in contemplation to send it on; and another, dated 7th January, stating that, on further examination, the whole cargo was found to be damaged: it was held that the owners, on the receipt of the latter letter, were still in time to abandon (3). It seems to be the province of the judge to direct the jury as to what is a reasonable time for making the abandonment (4). Where a vessel sailing with corn from Waterford to Liverpool, under a policy, with a memorandum to be free from all but general average, was stranded near Waterford on the 28th of January, and continued under water at times for near a month, during which time the assured, at low water, were employed in saving the cargo for their own benefit, and the whole of the cargo being damaged, but some recovered, and no notice of abandonment was given to the underwriters in London till the 18th of February: it was held that this was not notice in such a reasonable time as to entitle the insured to abandon as for a total loss (5). So where the blockade of Havre had been publicly notified here on the 6th of September, and no notice of abandonment given till the 14th of October, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any authority shewn for giving it then: it was held that the notice was out of time, and this, though the plaintiff's agents in this country had no notice till the 17th of October, of the decree for restoration of the ship and goods in question, which had been

(1) Park, 280. 7 East, 43. 15 East, 563. 5 M. & S. 47.

(2) 2 Marsh. Rep. 88. 6 Taunt. 383. S. C.

(3) 2 Marsh, 88. S.C. 6 Taunt. 383.

(4) Per Lord Ellenborough, C.J. 7 East, 43.

(5) 7 East, Rep. 38.

pronounced on the 8th of October (1). And where an insured vessel arrived at the port of Kinsale, on the 24th November, on the 14th December a second survey was had, when it was found that the expences of the repairs would exceed the value of the ship, and the insured having given notice of abandonment to the insurers in London, on the 6th January, it was held too late (2); and the same was decided upon a notice not having been given until five days after the insured received intelligence of the loss. (3)

Of abandonment.

With respect to the *form* of the abandonment, it does not appear that any peculiar set of words is necessary; it must, however, be explicit, unconditional, and absolute, and not taken as a matter of inference from an equivocal act, and, therefore, where a letter from the insured, stating that the ship had been forced on shore, and a quantity of sugars damaged, was shewn by the broker to the underwriters, and they, by way of answer, desired that the insured would do the best he could with the injured property; in an action on the policy it was insisted that this letter amounted to an abandonment, and that the answer of the underwriters was an assent to it; but Lord Kenyon, who tried the cause, said, that as this was but a partial loss, the insured could not by their own act turn it into a total one; that it was the interest of the underwriters, and the duty of the insured, to make a partial loss as light as possible; and that this was the meaning and import of the letter, and of the answer of the underwriters (4). It seems that no protest of abandonment is necessary in England, as it is in some foreign countries (5). Upon the abandonment, in order to make it effectual, the insured should, if required so to do, assign over the interest in the property insured. The refusal to assign is equivalent to a refusal to abandon. (6)

Any authorized party acting for the insured may give the notice of abandonment. If one of several parties interested in a cargo effects an insurance for the benefit of all, he may give notice of

(1) 9 East, 283.

1 Camp. 541.

(2) 1 Stark. 498.

(5) Montefiore, tit. Insurance.

(3) 5 M. & S. 47., & see 3 Brod. & B. 147.

(6) Atcheson's Rep. 18. 8 T. R. 268.

(4) See 1 Esp. Rep. 237. 9.

Of abandonment. abandonment for all (1). The notice may be given to the underwriter himself, or to the agent who has subscribed for him.

Effect of the abandonment.

4th. *Of the effect of the abandonment.* With respect to the effect of an abandonment, we have seen that by the abandonment the insured yields up to the insurers all his right, title, and interest in the ship or goods insured, or what may be saved of them, which from the notice of abandonment becomes the property of the insurers. It operates as a transfer to them in proportion to their respective subscriptions, without any regard to the priority of the policies, if more than one, and though the ship or goods should appear by the several policies to be over insured; and this transfer has a sort of retrospective relation in reference to the insurers, who, to the extent of the sum insured, are presumed to have been from the beginning owners of the thing insured. A shipowner having first insured his ship with A. &c., and his freight with B., &c. for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss, first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it, and afterwards undertaking by a similar memorandum on the freight policy to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured; it was held that however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship, yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight, and that without deducting the expences of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ship afterwards (2). When the insurance is for less than

(1) 5 M. & S. 57.

(2) 4 East, 34. S. P. 3 Bos. & Pul. 479.

the value of the thing insured, the abandonment is the same in proportion. Thus, if goods of the value of £5,000 be insured only to the amount of £4,000, and a total loss happen, the insured shall only abandon four-fifths of what is saved; the remaining fifth will belong to himself, and for it he will be tenant in common with the insurers. So if goods be partly insured, and money be borrowed on *respondentia* for the residue, the insurer will have the legal title to what is abandoned, and the lender an equitable claim for his proportion. (1)

Of abandonment.

An abandonment to the underwriter on a ship transfers the freight subsequently earned as incident to the ship; therefore, where ship and freight were insured by separate sets of underwriters, and the ship, being a general ship, was captured, and ship and freight were abandoned to the respective underwriters, who paid each a total loss, and the ship being recaptured, performed her voyage, and earned freight, which was received by the defendant for the use of those who were legally entitled thereto, it was held that the underwriter on the ship was entitled to recover (2). A policy on freight at and from the ship's port of loading at J., to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of the goods loaded at an intermediate port; and therefore, where a ship having sailed with a cargo loaded at J., was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight; it was held that the assured who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expences attendant upon procuring the said freight (3). Where a ship was forcibly detained in a foreign port, the owner abandoned first the ship, and then the freight, to the different sets of underwriters thereon, who paid as for a total loss, after which

(1) Montefiore's Dic. tit. Ins. 379. 5 Moore, 116. 8 Price, 542.

(2) 5 M. & S. 79. 2 Brod. & B. (3) 5 Maul. & Sel. 6.

Of abandonment. the ship was liberated, re-shipped her cargo, which had been taken out, and returned home earning freight, which was received by the assured; it was held that each set of underwriters were respectively entitled to the benefit of salvage, subject to the deductions of the necessary expences of saving it applicable to each underwriter (1). If after the loss is paid compensation is made to the owner for the loss sustained, this compensation shall go to the underwriters. (2)

Many questions have arisen whether an insurer having once abandoned, and it turns out afterwards that he ought not or could not have abandoned, he is bound by such abandonment. If an abandonment be once properly made on sufficient ground, and the abandonee accede to such abandonment, it is absolutely binding on both parties, and can only be revoked by mutual consent (3). But if the assurers do not accede to the abandonment, and in the end there arises only a partial loss (4); or if the abandonment be made under a supposition by both parties that there was a sufficient cause for the abandonment, when in fact there was not, then indeed the abandonment will not be binding on either party, and the insurers would in general be only liable for a partial loss.

Adjustment.

We will next consider the adjustment of the loss, and the effect of such adjustment. *The adjustment* of a loss is the settling and ascertaining the amount of the indemnity, which the insured, after all allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion of that which each underwriter is liable to pay. In making this adjustment the general rule is, that the contract of insurance ought not to be lucrative, nor enable the insured to make a profit out of the loss of another; it ought merely to afford him an indemnity, and no more; the insurer ought never to pay less, nor the insured receive more, than that which a fair indemnity demands. But this general principle, that the insured shall, in case of a loss, recover no more than an indemnity, may be controlled by a legal mercantile usage (5). In estimating a total loss upon

(1) 7 East, 24.

(2) 1 Ves. 98.

(3) 2 Dow. 474.

(4) 4 M. & S. 393. 5 M. & S. 418.

(5) 1 Bingham, 61.

goods insured by an open policy, it has been the uniform practice to add to the prime cost all duties, &c. In the case of a total loss, where the insured abandons, and the policy is a valued one, he is entitled to recover the whole sum insured, subject to such deductions as are enumerated in the policy. The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the lading port, together with the duties and expences, and the premium of insurance, and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound and that of the damaged part of the goods at the port of delivery, and applying that proportion (be it half, a quarter, an eighth, &c.), with reference to such estimated value at the lading port, to the damaged portion of the goods (1). No difference of exchange should be regarded in the adjustment, for the underwriter does not insure against any loss arising from such causes (2). In cases of general average the things saved contribute not according to the prime cost, but according to the price for which they may be sold at the time of settling the averages (3). An usage that the loss in an open policy on freight shall be adjusted on the gross, and not on the net amount of the freight, is a legal usage (4). It is only in the case of a total loss that there is any difference between an open and a valued policy; in a valued policy the value is admitted, and the insured has only to prove that the goods insured were on board; in an open policy it is necessary to prove their value; but with respect to a partial loss the like enquiry is to be made of the amount in either sort of policy (5). A partial loss of either ship or goods is that proportion of the prime cost which is equal to the diminution in value occasioned by the damage. In a case on a valued policy upon goods, it was determined that the diminution in value was that proportion of the value in the policy, which the difference between the price in the sound and the price of the damaged bore to the price of the sound at the port of delivery (6). The rule by which to calculate a partial loss on a policy on goods, by reason of sea damage, is the difference between the respective

(1) 12 East, 689. Park. 176.

(2) 1 Esp. Rep. 77.

(3) Montefiore, tit. Insurance.

(4) 1 Bingham Rep. 61. Dallas, C.J. dubitante.

(5) 2 Burr. 1171.

(6) 2 Burr. 1167.

Adjustment. gross proceeds of the same goods when sound and when damaged, and not the net proceeds, it being settled that the underwriter is not to bear any loss from fluctuation of market, or port duties, or charges after the arrival of the goods at their port of destination (1). If the value of the policy exceed the interest of the assured, the loss is adjusted in the same manner as if the policy were an open one, and the computation must be made by the real interest on board, and not by the value in the policy (2). When the loss consists in the loss of one entire individual parcel of the goods insured, and this is capable of a several and distinct application, as if out of 100 hogsheads of sugar ten happen to be lost, and the rest arrive safe, the insurer must pay the value of the ten (3). If several articles be insured for one entire sum, but each distinctly valued, and only one be put in risk, if that one be lost the insured shall recover such a proportion of the sum insured as the value of that article bore to the whole (4). Where part of the goods is saved, exceeding the amount of the freight, the practice is to deduct the freight from the salvage, and make up the loss on the difference; where freight exceeds the salvage, it is a total loss (5). Where all the goods are damaged, it is necessary to ascertain the quantum of such damage, which is done by taking the value of the goods in their damaged state, and deducting it from the prime cost.

With respect to ascertaining the value of the goods or property lost, various opinions have been prevalent; but it is now an invariable rule, to estimate a total loss on an open policy, not by any supposed price which the goods or property might have been deemed worth at the time of the loss, or for which they might have been sold at their market, but according to the invoice price (6). There does not appear any instance of profit being avowedly added, even where the loss has happened at the port of delivery; for instance, if £1000 be insured on goods which are lost in the port of delivery before they are landed, and it appear that the invoice price, together with all charges, and the premium of insurance, amount to £800, but the goods at the time of the loss would, had they been safely landed, have been worth £1000, the sum insured, yet the loss would be esti-

(1) 2 East, 581. 3 Bos.&P. 308.
 (2) *Le Cras v. Hughes*, B.R.E.T.
 22 G. 3. Park, 174.
 (3) 2 Burr. 1170.

(4) 1 Esp. Rep. 207.
 (5) 2 Stra. 1065.
 (6) Park, 167. Burr. 1167.
 1 Esp. Rep. 77.

mated at no more than £800; so that, whether the goods arrive at a rising or falling market, the loss to be paid by the underwriter is the same. The best reason that can be assigned for this is the difficulty of ascertaining the true amount of the loss, where profit which is so uncertain is to be taken into the account. It might with some degree of plausibility be insisted, that the payment of the prime cost, after a long voyage, and when the goods insured had almost reached a market where they would have sold for a great profit, does not amount to an indemnity; for besides the loss of the profit the merchant might reasonably have expected, he also loses all the benefit he could have derived from the use of his money in any other adventure. Upon this principle the *consolato del mare*, in laying down rules for average contributions, declares, that if the goods be lost before half the voyage is performed they are to be valued only at prime cost, but if after then, at the price at which they might have been sold at the port of delivery. However reasonable this rule may be, abstractedly considered, it would be more than counterbalanced by the litigation it would occasion to decide whether the voyage was half performed, or if that were indisputable, then what was the market price at the port of delivery. A ship is valued at the sum she is worth at the time she sails on the voyage insured, including the expences of repairs, the value of her furniture, provisions, and stores, the money advanced to the ship's company, and in general every expence of outfit, besides the premium of insurance. An agent authorized to underwrite a policy may adjust a loss. (1)

Adjustment.

An adjustment being indorsed on the policy, and signed by the underwriters, with a promise to pay in a given time, is *primâ facie* evidence against them, and amounts to an admission of all the facts necessary to be proved by the insured to entitle him to recover in an action on the policy; it is like a note of hand, and being proved, the plaintiff has not occasion to go into proof of any other circumstances (2). But the adjustment is only *primâ facie* evidence against the insurer, and in general has no other effect than throwing the burthen of the proof on the insurer; and if there has been any misconception of the law or fact upon which it has been made, or there be any fraud, the

Effect of an adjustment.

(1) 1 Camp. 43. n. Simpson, Sit. after M. T. 41 Geo. 3.
 (2) Beawes, 310. Wibic v. 2 Esp. 489. S. P.

Adjustment.

underwriter is not absolutely concluded by it (1). And it has been held that adjustment will not shut out a ground of defence to which the attention of the party was not particularly drawn (2). Where the defendant, with several other underwriters, in August 1814, subscribed a policy on hides from Buenos Ayres to London, the ship was captured, and the plaintiffs abandoned the cargo to the underwriters, and claimed a total loss; some time after the ship was recaptured, and all the underwriters but the defendant, on the 19th of October 1814, adjusted a salvage loss, deducting short interest, to the amount of £64 18s. 3d. per cent., which they paid; the defendant, on the 7th of February 1815, “adjusted £33 per cent. on account of his subscription to the policy, until the account of the goods insured could be made up, when a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded £33 per cent. the defendant was to pay the excess, if short the insured to return the difference.” It was held in an action to recover such loss, that this was a conditional and not an absolute adjustment; and as the plaintiffs had not proved that the account of the goods insured had been made up, they were not intitled to recover; and that the defendant was not bound by the former adjustment of the other underwriters (3). A ship was insured warranted free of capture in port; a letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted; the former returned, and the latter received back the premium; it afterwards appeared the capture was not in port; it was held that the assured was not precluded by the adjustment and repayment from recovering on the policy, whether the underwriter’s name had been struck off the adjustment only, or off the policy also (4). After a total loss and adjustment, and whilst the policy remained in the hands of the broker, the initials of the insurer were struck out of the adjustment, to indicate payment, and the broker debited the insurer with the loss; it was held that the insurer was still liable to the assured, as the principal was never estopped from recovering the amount, unless there was actual payment to the broker, or a credit given. (5)

When the insured are entitled to a return of the premium.

The premium is to be returned in all cases where the contract is void for want of interest, which may be either total, as

(1) *Id.* Park, 194.

(2) 1 Camp. 274.

(3) 1 Moore, 563. See 8 Taunt. 119.

(4) 4 Taunt. 725.

(5) 2 Stark. 67.

where the insured has nothing on board the ship, or partial, where he has some interest, but not to the amount in the policy ; and it is a general rule, that wherever any insurance is made through mistake, misinformation, or other innocent cause, without interest, or for more than real interest, there shall be a return of premium. If by several policies made without fraud the sum insured exceeds the value of the effects, the several policies in effect make but one insurance, and will be good to the extent of the true interest of the insured, and in case of loss all the underwriters on the several policies shall pay according to their respective subscriptions, and in like manner all will be entitled to a return of premium for the sum insured above the value of the effects in proportion to their respective quotas. On a wager policy, the insured cannot recover back the premium, at least after the risk is run ; for though this policy is void, as being without interest, yet both parties being guilty of a breach of the statute 19 Geo. 2. c. 37., the rule, that where both parties are equally criminal the possessor has the advantage, applies, and the insured cannot recover back the premium (1). The reason why the plaintiff could not recover in this case was, that an action brought to rescind a contract must be brought while the contract continues executory ; that in this case the plaintiffs waited till after the risk was run, when it was too late ; had they brought their action before the risk was over they might have recovered. It has since been determined, that if the contract be void, as being a re-insurance within the stat. 19 Geo. 2. c. 37. s. 4., the insured shall not be entitled to return of premium (2). If at any time the insurer could have been called on to pay the sum insured, there is no return of premium ; so in the case of a valued policy, though the sum in the policy be double the value of the effects insured, there shall be no return of premium ; and captors having an insurable interest in their prize before condemnation, if they insure shall not have a return of premium, though it should afterwards be adjudged no prize, and restitution be awarded to the owners by the court of admiralty (3). Though an insurance to protect a trading with the enemy is void, the insured shall not recover back the premium ; this has been adjudged on the same principle as the insurance on the gaming policy ; namely, that both parties being equally criminal, the

When premium
is recoverable
back.

(1) Doug. 451.

(2) 3 T. R. 266.

(3) 8 T. R. 154. See also
1 M. & S. 35. 14 East, 481.

When premium
is recoverable
back.

possessor has the advantage (1). A foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the British laws; therefore, where a policy was effected upon a Danish ship, at and from Bengal (where there are Danish settlements) to Copenhagen, and the ship loaded at Calcutta, contrary to 12 Car. 2. c. 18. s. 1., the court of common pleas held the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at Calcutta had prevailed for a length of time, and had been authorized by act of parliament soon after the shipment in question (2). And the assured were held to be not entitled to a return of premium upon a policy at and from a place within the limits of the South Sea Company's charter, the ship being without a licence from the South Sea Company at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could, and before they knew of her loss, and the licence was made to relate to a time antecedent to the loss (3). If the contract be void on account of a non-compliance with any warranty express or implied, as if the ship do not sail on the day prescribed, or be not seaworthy, and there be no fraud imputable to the insured, he shall be entitled to a return of premium. If the policy be void for fraud on the part of the insurer, there can be no doubt but an action will lie for a return of the premium, as in the case of an insurance made on a ship, when the insurer at the time of the contract knows of its safe arrival; but the whole court were of opinion, that in all cases of actual fraud on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium. (4)

It is a general rule, that if the risk be not begun, from whatever cause, the premium shall be returned; but where the voyage is divisible into several distinct risks, and which in fact is several voyages, the premium may be apportioned according to these several risks, and for any of them not commenced the proportion of premium applicable to them shall be returned (5). In a case where a ship was insured at and from Jamaica to Liverpool, warranted to sail on or before the 1st August, premium ten guineas per cent., to return eight guineas if she sailed with

(1) 1 East, 96.

(2) 3 Bos. & Pul. 35. S. P.
7 East, 449.

(3) 4 Maul. & Selw. 16.

(4) 3 Burr. 1909.

(5) 1 Bos. & Pul. 172.

convoy; she did not sail till September: it was determined that the insured should be entitled to eight guineas per cent. for convoy, and not to an apportionment of the rest of the premium, the risk not being divisible (1). The following case, however, appears to have shaken the preceding one: goods were insured "at and from Jamaica to London, warranted to depart with convoy, and sail on or before the 1st of August, at a premium of twelve guineas per cent.;" the ship sailed from Jamaica to London on the 31st of July without convoy, whereby the underwriters became discharged from the remaining risk; an action was brought for the return of the premium, and proof having been brought in this case, (which was not done in the above case,) of an usage in insurance at and from Jamaica to London, warranted to depart with convoy, to sail on or before a certain day, to return the premium, deducting one half per cent. if the ship sailed without convoy: on this the court ruled, that the insured should recover the residue of his premium (2). But if the risk be entire, and be once commenced, there shall be no return of the premium (3). In like manner, if the insurance be for a term specified, and for one entire premium, if the risk be begun, and an event happen immediately afterwards to determine the contract, there shall be no return of the premium. Thus, a ship insured for twelve months, and warranted free from capture or seizure, is captured within two months, there shall be no return for the residue of the premium (4). A ship insured against capture for twelve months is lost in a storm within two months, the premium is 9 per cent., expressed to be "at and after the rate of 15s. per month," yet there shall be no return of the premium (5). In an action on a policy of insurance, with a count for money had and received, if the defendant pay no money into court, but established as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. (6)

When premium
is recoverable
back.

If part of the premium is to be returned on the performance of a particular stipulation, as an insurance on goods, so much to

(1) B. R. East. T. 24 Geo. 3.
Marsh on Ins. 568.

(2) Long v. Allen, B. R. East.
T. 25 Geo. 3. Park. 589.

(3) Dougl. 751.

(4) Cowp. 666.

(5) Dougl. 564.

(6) 2 Bos. & Pul. 330.

When premium
is recoverable
back.

be returned "if the ship sail with convoy and arrives," this shall be returned, though the insurer be obliged to pay any partial loss on those goods, provided the ship arrives. (1)

It is a general custom throughout Europe, to allow one half per cent., which is allowed to the insurer, where the contract is void from some radical defect, provided this was unknown to him at the time he entered into the contract; but if he was informed of the fault, or must have known it before subscribing the policy, he can have no claim to this allowance. (2)

The remedy for
breach of policy
of insurance.

The usual remedy or form of action against the insurers or underwriters, to recover a loss upon a policy of insurance not under seal, is an action of assumpsit formed on the express undertaking of the insurers who have signed the policy; if the policy be under seal, the action thereon must be in covenant. The two insurance companies, namely, the Royal Exchange and London Assurance, having been, in consequence of the stat. 6 Geo. 1. c. 18., incorporated by several charters granted, and having a common seal affixed to all their contracts, the proceedings against these companies must be by action of debt or covenant. If there has been a double insurance, then it will be proper to consider against which of the underwriters (as the best man, or in the best circumstances) the action shall be brought. In actions upon a policy of insurance against several underwriters, the court by consent of the plaintiff will make a rule on the application of the defendants, which is called the consolidation rule, for staying the proceedings in all the actions except one, upon the defendants undertaking to be bound by the verdict in that action, and to pay the amount of these several subscriptions and costs, in case a verdict shall be given thereon for the plaintiff. (3)

(1) Dougl. 255. 2 Bos. & P. 11.

(2) See Mont. Dict. tit. Ins.

(3) Tidd's Practice, 7 ed. 635.

Sec 2 N. R. 430.

CHAP. XI.

Of Liens.

WE have now to consider the liens and securities created by law, or entered into by the parties, in order to secure the performance of those contracts which have been examined. *Lien* (1), in its most limited signification, is a right of detaining the property of another until some demand be satisfied (2). The right of lien generally arises by operation of law, but in some cases it is created by express contract. When it arises by express contract, it is a right more in the nature of a pledge or deposit. There is, however, a very trifling, indeed scarcely any difference between these rights, and in general the benefit arising from each of them is the same. (3)

Definition, and how created in general.

There are two descriptions of liens, viz. *particular* and *general*. *Particular* liens are where persons claim a right to retain property, in respect of labour or money expended on such particular property, and these liens are favoured (4), unless the interests of creditors in general are injured by them (5). *General* liens are claimed in respect of a general balance of account, and are looked upon with jealousy (6). Liens may arise in three ways. 1st. By express contract. 2d. By implied contract, as from general or particular usage of trade. 3dly. By legal relation between the parties. (7)

Different descriptions of liens.

We will now proceed to consider, 1st, How these different sorts of liens may be created, and what persons are entitled to

(1) See Whitaker's Law of 119. 6 T.R. 14. 7 East, 228.

Lien. Montague on Liens. Ellis, Law of Debtor and Creditor, 220.

(5) 3 Bos. & P. 485.

(2) See 2 East, 235. 6 East, 25. 2 Camp. 579. 2 Merivale, 404. 2 Rose, 357.

(6) 3 B. & P. 42. 494. 1 Esp. N.P.C. 109. 4 Burr. 2221. 7 East, 228. Selw. N.P. 1318. Whitaker,

8. The question whether a lien exists, is decided on the same grounds at law and in equity, 2 Mer. 404.

(3) See 4 Taunt. 642. Holt, C.N.P. 383. 6 T.R. 263. 2 Merivale, 404. 1 B. & A. 582. See distinction between a lien and a set-off. Whit. on L. 3., see post, tit. Set-off.

(7) This division is laid down by Bayley, J. in 1 Barn. & Ald. 582. See Whitaker, 7. Selw. N.P. 1318.

(4) See 1 Atk. 228. Amb. 252. 1 Black. 651. Dougl. 97. 3 T.R.

them. 2dly, The necessary requisites of liens in general. 3dly, Rights and liabilities of party claiming the lien. 4thly, How a lien may be determined. 5thly, How a lien may be received.

In what cases a particular lien may be acquired.
1st. By express contract.

A particular lien may be acquired in any case where the parties, either by parol or in writing, expressly stipulate for it, which is generally either where the goods are placed in the hands of a person for the execution of some particular purpose on them, with an express contract that they shall be considered as a pledge for the labour or recompence the execution of that purpose may occasion; or where property is merely pawned or delivered for bare custody to another, for the sole purpose of being a security for a loan made to the owner on the credit of it (1), though indeed, as we have before seen, this species of lien may be considered more in the nature of a pledge. By an express agreement the parties may, by the introduction of a stipulation to that effect, waive or prevent a lien, which would otherwise be created by usage of trade, or by legal relation. In many respects this manner of creating a particular lien is advantageous, as the parties know more decidedly how to act. (2)

2d, By an implied contract, as by usage of trade, &c.

A particular lien may exist where there is a long established general usage of trade to that effect, or where there is a particular usage of trade between the parties themselves, which in effect might be considered as an implied contract for the lien. The existence and extent of liens created in this manner are matters of evidence (3). Where there is any transaction between the parties which is out of the usual course of trade, then indeed no lien can be created by usage, as if goods be deposited in the nature of a pledge for a particular purpose (4); and where a carpenter, who had worked for some time in the queen's yards, declined working there any longer, and the surveyor refused to let him take away his tools, on the ground that there was an usage for the surveyors of the queen's yards to detain the tools of workmen, in order to compel them to continue working

(1) Cro. Car. 271. 6 T. R. 14. Whitaker, 27.

(2) 6 T. R. 258. 3 M. & S. 167. 7 Taunt. 14. 278. 4 B. & A. 50. Bull. N. P. 45.

(3) 6 T. R. 14. 1 Esp. 109. 3 Esp. 81. 1 Ark. 228. 235. Pre.

Chan. 580. 1 Esp. 109. 3 B. & P. 42. The mere opinion of witnesses is not sufficient to prove such usage. 4 T. R. 260. Cowp. 251.

(4) 6 T. R. 258. 3 M. & S. 167.

until the queen's work should be finished, it was decided that the surveyor could not detain them on that ground. (1)

Of particular
liens.

So a particular lien may be created by legal relation in two ways. 1st, Where the law throws an obligation on a party to do a particular act, and in return for which, to secure payment, it gives him such lien (2); and 2dly, where, from circumstances, a party has bestowed his labour and expence upon the property detained, thereby creating a moral and legal obligation on the owner of such property to make a remuneration before he can take them away. Upon the first principle it has been held that common carriers (3), innkeepers (4), and farriers (5), have a particular lien for their respective labours and expences in regard to their particular employments.

3d, By legal re-
lation.

Upon the second, it may be taken as a general rule, that wherever goods are delivered to a tradesman, or other person, for the execution of the purposes of his trade or occupation upon them, and he incurs expence and trouble in the execution of such purposes, he has a particular lien upon them (6). Thus *calico printers* (7), *dyers* (8), *fullers* (9), *millers* (10), *packers* (11), *printers* (12), *tailors* (13), and *wharfingers* (14), have a particular lien on goods, linen cloth, corn, or prints, dyed, printed, fullled, ground, packed, made up, or wharfed by them respectively, such property having been left with them respectively for those

(1) 6 Mod. 212. Bac. Ab. tit. Trover.

(2) 1 Esp. 109. 6 East, 519. 2 Lord Raym. 866.

(3) Lord Raym. 867. 6 T. R. 17. 3 Bos. & P. 42. As to who are carriers, and their responsibility, &c., see ante 369.

(4) Id. ibid. 1 Esp. 109. As to who are innkeepers, and their liabilities, see ante 365.

(5) Bac. Ab. tit. Trover, E. 694. Yelv. 67. Whitaker, 113.

(6) 1 Atk. 228. 235. As exceptions to the above rule it has been decided, but upon what ground it is not easy to imagine, that agisters of cattle (Cro. Car. 271.) and livery stable keepers (Lord Raym. 866. Esp. N. P. 583. 90.) have no lien

for the agistment or keep of cattle or horses.

(7) Co. B. L. 429. 3 Esp. 268.

(8) Sayer, R. 224. 6 T. R. 14. 3 Bos. & P. 42., but it must be for the price of dying. 4 Burr. 2214. 1 Blk. 651.

(9) 1 East, 4.

(10) 1 Atk. 235.

(11) 1 Atk. 228. 1 Bla. Rep. 651. 4 Burr. 2222. 4 Esp. 53.

(12) 3 M. & S. 167.

(13) Y. B. 5 Ed. 4. fol. 2. Yelv. 67. Hob. 42. Cro. Car. 271. 9 East, 433. 6 Bac. Ab. 694.

(14) 1 Esp. R. 109. 3 Esp. 81. But the goods must be actually wharfed. 4 T. R. 260. 1 Bla. Rep. 413. 423.

Of particular
liens.

purposes. It has been doubted whether a *warehouseman* has a lien for warehouse rent (1); but a *shipwright* has a lien upon a ship for repairs done to it in his dock. (2)

The master or owner of a ship, whether it be a general or chartered one, has a lien upon the cargo or luggage (but not the wearing apparel actually in use) (3) of a passenger for freight, passage-money, primage, average, or salvage, and is not bound to part with it till his demands in this respect are satisfied (4). And the master has a lien upon the goods for freight, though the goods be furnished to the ship by his direction and on his credit (5). But the shipowner has no lien for dead freight, where the remedy is in damages (6), and the owner has not a lien for dead freight or demurrage under a covenant, where the freighter binds the goods and merchandizes in the ship in a penal sum for non-performance of the covenants (7). And the master or owner of a ship has no lien on the cargo for wharfage, convoyage, &c. against the directions or contract with the owners of the cargo, nor for any other charges which are incidental to the ship, and not to the cargo (8). The captain of a ship has no lien on the ship, or freight, for his wages, or for money expended, or debts incurred by him for repairs done to it here or on the voyage (9), though under circumstances a court of equity will allow him this lien (10); and no person has a lien on the ship for necessities provided in England (11). But it has been ruled that the captain has a lien on the freight for goods furnished to the ship by his direction, and on his credit (12). And the consignee of a ship for sale, to whom the ship and ship's register is delivered, has a lien upon the register of the ship, and of the ship for money which, after

(1) 1 Camp. 410.

(2) 4 B. & A. 341. 1 Atk. 228. 234. 2 Rose, 194. 229. Abbott on Shipping, 134. 4 Camp. 146.

(3) 2 Camp. 631.

(4) See Abbott, 276. 12 Mod. 447. 511. 1 Esp. 23. 1 East, 507. 2 Camp. 631. 1 B. & A. 582. 1 M. & S. 147. Ante, 417. 440, 441.

(5) 4 Esp. 22.

(6) 15 East, 547. 3 M. & S. 205. Ante, 419.

(7) 3 M. & S. 205. 2 Mer. 401. Ante, 430.

(8) 4 T. R. 260. 1 Bla. R. 423.

3 Burr. 1409. 3 Campb. 360. 1 Esp. Repts. Laubert v. Robinson.

(9) Dougl. 101. 9 East, 426. 13 Ves. 300. Abbott, 35. 1 B. & A. 581.

(10) 2 P. Wms. 269. 19 Ves. 474. 3 Ves. & B. 135.

(11) 2 Show. 338. Salk. 34. Lord Raym. 809. Abbott, 135. 1 Ves. 154. 1 Atk. 234. Dougl. 97. 2 P. Wms. 367. Cowp. 636. 1 T. R. 109. 4 Esp. 23. 7 T. R. 313. 1 B. & A. 581.

(12) 4 Esp. 22.

her arrival, he pays for seamen's wages, and the necessary use of the ship (1). And it has been decided in a court of admiralty, that a person who has supplied arms and stores in London to a foreign ship, has a lien upon the surplus arising from the sale of a ship, under a decree of the court in a suit by the mariners for wages (2). *Seamen and others* (except the captain) (3) have a lien upon the ship for wages (4). The seamen have a lien upon the ship for wages earned in rigging and fitting it out, or for wages due in preparing for a voyage on which the ship does not proceed (5). Seamen have a lien for wages for bringing a ship from one port in England to another. (6)

Of particular
liens.

A *vendor* of property has a particular lien upon it, as long as it remains in his possession, and no constructive delivery has taken place, and the vendee neglects to pay or tender the price agreed upon for it (7). *Bankers* have a lien upon all paper securities of their employers in their possession, for debts accruing on the particular account for which the securities were deposited (8). So *agents, factors, or brokers* have a particular lien on goods of their principal coming into their possession in the course of their trade, for the charges incident to those particular goods, without regard to the time when, or on what account, such goods were received (9). Insurance brokers have this lien upon the policies of their employers in their hands, and upon the money received by them upon those policies for the account of their commission, and the premiums of the policies themselves (10). *Attornies and solicitors* of the different courts of law and equity have a lien for their costs incurred in a cause upon all papers, and the money of their clients, that come into their possession in those charac-

(1) 2 East, 227. 1 Marsh. 76.

(2) 3 Rob. 288. Abbott, 144.

(3) Abbott, 461. 1 B.&A. 581.

(4) Dougl. 101. 2 P. Wms. 367. 2 Dodsw. 100.

(5) 2 Lord Raym. 1044. 6 Mod. 238. S. C. Sayer, 127. Abbott, 467.

(6) 1 Vent. 343. Abbott, 461.

(7) Y. B. 5 Ed. 4. fol. 2. S. P. 22 E. 4. fol. 49. Hob. 41. 1 H. Bla. 363. 2 Bla. Com. 448.

1 Taunt. 458. Long on Pers. Prop. 147. 151., and see post as to how

this lien may be divested.

(8) 1 Esp. Rep. 66. 5 T. R. 488.

4 Esp. 53. 17 Ves. 431. But a

banker has no lien on muniments casually left in his shop after he has refused to advance money on them as a security. 7 Taunt. 278.

(9) 2 Atk. 623. 2 Vern. 203.

Cowp. 251. 2 Burr. 931. 3 Bos.

& P. 488, 9. Ambl. 252. 1 Burr.

494. 6 East, R. 28. n. S. P. ante, 211.

(10) Co. B. L. 566, 567.

Of particular
liens.

ters, for the purpose of business, and though such papers do not come into their hands in the particular cause, or on the particular occasion from which their demand arises (1); and an attorney has a general lien, and a lien upon all papers in his possession, although his charge is not in the cause for which the papers are delivered. (2) But this lien of an attorney is only commensurate with the right which the party detaining them has therein; and therefore where the delivery is unauthorized, or the property, at the time of the delivery, is *bonâ fide* in a third person, the attorney cannot detain them (3); and if the client is bound to produce the thing detained for the benefit of a third person, so also is the attorney (4). It is questionable whether an attorney has any lien on proceedings in bankruptcy; but it should seem he has not as against the assignees (5), though he may against his own client (6). If a client change his solicitor in the country, the agent has a lien for what is due in the cause from the new solicitor and the old solicitor (7). A clerk in chancery has a lien upon papers in his hands till his bill is paid (8); so a six clerk is entitled to retain papers in his hands for his fees, though the client has paid his solicitor, and the solicitor has satisfied the clerk in court the whole of his bill (9). A clerk in court has a general lien, as well on collateral proceedings as on a decree (10). A clerk in court has a lien upon a sum due from the client to the attorney by whom a bill has been delivered, including the clerk in court's demand. (11).

(1) Whitaker, 75. 12 Mod. 554. 4 T. R. 123. 3 T. R. 275. 2 Scho. & Lef. 279. 115. 1 Scho. & Lef. 315. 1 M. & S. 535. 4 B. & A. 466. Dougl. 104. 16 Ves. 280. 164. 1 Lord Raym. 738. 1 Taunt. 38. 15 Ves. 297. 13 Ves. 161, 195. 14 Ves. 271. Tidd, 7 ed. 100. As to an attorney's rights in general, see Dougl. 104. 238, 239. 1 Taunt. 38. 1 Scho. & Lef. 315. 13 Ves. 161. 195. 2 Ves. sen. 25. 6 T. R. 361. 1 East, 64. 2 N. R. 99. 2 Ves. 25.

(2) 18 Ves. 382. 16 Ves. 259. 2 Scho. & Lef. 279., sed vide 4 Maddox Rep. 391.

(3) 4 Taunt. 320. 807. 7 Vin. Ab. 74. Co. B. L. 429. Bac. Ab. tit. Attorney, f. 2 Scho. & Lef. 279. 8 Mod. 307. 3 Atk. 720. 5 Moore, 95. 2 B. & P. 28. 1 Price, 375.

(4) 2 Scho. & Lef. 115.

(5) 19 Ves. 161. 13 Rose, 395.

(6) 1 Rose, 134.

(7) 15 Ves. 297.

(8) 2 P. Wms. 460. 2 Stra. 1126. 3 Burr. 1313.

(9) 2 Ves. 111. 3 Atk. 727. S. C. 3 Ves. jun. 589. 2 Atk. 114. Q. If a Clerk of Assize has such lien? Dougl. 185.

(10) 2 Ves. sen. 25.

(11) 2 Stra. 1126. 3 Burr. 1313. 15 Ves. 297.

And another branch of the above rule is where goods come into the possession of a *party by finding*, and he has been at some trouble or expence in the preservation of them; as where a party, by his own labour, risk, or expence, preserves the property of another from loss at *sea*, when the owner, or those entrusted with the care of them, have either abandoned or are unable to protect or secure them, he is entitled by the common law of England to retain possession of the goods saved, until a proper compensation is made to him for his trouble (1). But this rule only applies to cases where the property is saved from loss at *sea*, and not where it is saved from loss on a river or on land (2); and a man who finds the property of another which happens to have been lost or mislaid, and who voluntarily puts himself to some trouble and expence to preserve it, and to find the owner, has not a lien upon it for the recompence which he may reasonably deserve (3). The finder of a horse (4) or dog (5) has not a lien upon it for its expence or keep; and where timber, which was placed in a dock on the banks of the Thames, and got loose and was carried down by the tide and left at low water upon a towing path on the banks, and a person removed the timber to a place of safety, it was held he had no lien upon the timber for his trouble and expences. (6)

Of particular
liens.

And another branch of the above rule is where goods have been taken possession of under some *legal right*, and some expence has necessarily been incurred for their preservation, as where a horse is seized as an estray, and the lord of the manor has been at some expence of keeping it after he had proclaimed it (7). So goods seized under a distress, *damage feasant*, &c., may be detained until satisfaction of the injury be made (8). But where a horse was distrained to compel an appearance in an hundred court, it was held that after appearance the plaintiff

(1) See ante, 440. Lord Raym. 393. Salk. 654. Abbott, 356. 2 H. Bla. 254. 5 Burr. 2732. 8 East, 57. And as to the principle and good effects of this law, see 2 Selw. N. P. 1319.

(2) 1 Lord Raym. 393. 8 East, 57. 1 Saund. 265. Ante, 441.

(3) 2 H. Bla. 254.

(4) 2 H. B. 254.

(5) 2 Bla. 1171.

(6) 2 H. Bla. 254.

(7) 2 Rol. Ab. 92. m. pla. 3. 3 Bac. Ab. Trover, Bull. N.P. 45. But the lord should make demand of certain amends, otherwise a general tender of amends will be sufficient to bar him of his lien. Salk. 686. 11 Mod. 89.

(8) Bradby on Distresses, 205.

Of general liens, could not justify detaining the horse till his keep was paid for. (1)

In what manner
a general lien
may be created.
1st. By contract.

General liens are not favoured by our law, and the courts are in general inclined against them (2). Any party may acquire a lien for his general balance, by an agreement to that effect entered into between him and the owner of the property detained. Thus, a party in any trade or profession may give notice to, or agree with another, that he will not receive goods to be manufactured, or have any transaction with the other in the way of his trade or business, unless upon condition that he shall retain all goods and property of the owner in his possession, for any general balance due in respect of work or business of the same kind done and transacted for the employer (3). And there is no objection to a carrier or other party, who from the nature of his employment is bound to accept property for the execution of purposes of his trade, making a particular and express contract of the same nature with his employer; and it should seem, that if an express notice to this effect be given, and actually received by the employer, that these parties may claim a lien for a general balance (4). Sometimes this agreement for a general lien will be implied. Thus, upon an agreement with a miller, to grind quantities of corn at a stipulated price, part of which had been ground and delivered back in different parcels and at different times, and the rest remained in the miller's hands; it was held he had a right to detain the residue under the agreement for grinding the whole (5). The principle of this case applies to the lien of all workmen and others, who have bestowed labour on a chattel under such a special agreement. A printer employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of these numbers (6). The circumstance of a person's procuring a loan from another, who is already in possession of some of the former's property as a security for a prior loan, seems to

(1) Bull. N. P. 45.

(2) 3 Bos. & P. 42. 494. 126.
6 East, 526. 7 East, 224.

(3) 6 T. R. 14. 3 Bos. & P.
42.

(4) 5 Barn. & Ald. 350. 6 T. R.
14. 3 B. & P. 42. Whitaker, 38.
Semb. cont. This lien as against

the real owner of the goods would
not hold where goods have been
sent to the order of a mere factor,
and the carrier claims it for a general
balance due from such factor
to him. 5 B. & A. 350.

(5) 5 M. & S. 180.

(6) 3 M. & S. 167.

be evidence that the parties intended that the property should be a pledge for the whole debt. (1) Of general liens.

A general lien may arise where there is a general usage of trade to warrant it, and even here, indeed, the lien arises by implication of law of a contract for it; for where there is a usage of trade, it may be presumed to be founded by reason of contracts repeated so frequently, and so notorious, that every body must be considered as having notice of it (2). But as general liens are considered contrary to the policy of the common law, and to public convenience, and an infringement upon the system of the bankrupt laws, (the object of which is to distribute the debtor's estate proportionally amongst all creditors), to establish a claim to such a lien upon the ground of the general usage of any trade, strong evidence would be required of the frequency and notoriety of the usage; and in cases where the party claiming the lien is, from the nature of his trade, under a legal obligation to accept employment from any one who offers it, and for that reason has a right to a particular lien upon property entrusted to him in the course of his trade, the evidence of any usage for the extension of that lien to a lien for his general balance, ought to be proved by still stronger evidence than is necessary in cases where no such obligation exists (3). But where a general lien has been frequently proved and allowed to exist by the usage of any particular trade, the courts will not allow the right to be afterwards disputed. Accordingly, calico printers (4), packers (5), and wharfingers (6), have, by the custom of their respective trades, a lien upon the property of their employers entrusted to them in the course of their trade, not only for debts arising in the execution of the purpose for which the property was delivered, but for a general balance due from their employers in the course of their trade. So, where there is a course of dealings and general account between the merchant and factor, and a balance is

(1) 2 Vern. 691. 698.

(2) Whitaker, 31. 3 Bos. & P. 50. 2 Selw. N. P. 1318.

(3) Whitaker, 32. 6 T. R. 14. 3 Bos. & P. 42. 6 East, 519. 7 East, 224.

(4) Co. B. L. 429. 460. 3 Esp. 268. But this lien is confined to such general balance as arises from work done by him in the course of his trade, and cannot be claimed

for other debts due on other accounts from his employer, 3 Esp. 268.

(5) 1 Atk. 228. 235. 1 Bla. R. 651. 4 Burr. 2222. 4 Esp. 53. S. P.; and this lien extends to money lent by packers, 1 Atk. 228. Sed quere, see 8 Taunt. 499.

(6) 1 Esp. R. 109. 3 Esp. R. 81. 4 Esp. R. 93. 3 Bos. & P. 124.

Of general liens. due to the factor, he has a lien on all goods in his hands for such balance of the general account, without regard to the time when, or on what account he received the goods (1); and the lien attaches not only upon goods in specie, but upon the proceeds (2) and securities (3) received in the course of his business; and if a factor, having become surety for his principal, has been compelled to pay the debt, he has a right to consider it as part of the general account for which he is entitled to retain (4). And so indeed have bankers (5) a lien upon all paper and money securities paid in on the running account, insurance brokers (6) upon all policies, and attornies upon all papers in their possession belonging to their employers, and judgments recovered, for the general balance of their accounts (7). It has never been decided that fullers in general have this general lien (8), but by the particular custom of Exeter it seems they have (9). Dyers (10), millers (11), and printers (12), have not this general lien, neither have common carriers (13) or inn-keepers. (14)

By particular
usage of trade,

Any person may establish his claim to a lien for his general balance, upon the ground of particular usage or previous mode of dealing between him and the party from whom he claims it; and proof of their having before dealt upon the footing of such lien will be presumptive evidence that they continued to deal upon the same terms (15).

(1) Ambl. 252. 1 Burr. 494. 535. 4 Taunt. 807. Vide 1 Lord 6 East, 28. 3 B. & P. 488, 9. Raym. 738. 2 Scho. & Lef. 279. Cowp. 251. 2 East, 227. 3 T. R. 16 Ves. 259. 18 id. 382.

(2) 6 T. R. 258. But a factor has not a lien in respect of debts which have accrued previously to the time at which his character of factor commenced, 3 B. & P. 485. (8) 1 Atk. 228.; but it should seem they had, see 8 Taunt. 499.

Alvanley, C. J. dis. (9) 1 East, 4.

(10) 2 Chitty's Repts. 455. 4 Esp. 53. Montague's B.L. vol. 4. p. xviii. note a. acc. 4 Burr. 2214. 1 Bla. Rep. 651. S. C. 6 East, 523. in notes. Whitaker, 100.

(11) 1 Atk. 235. 1 Bla. Rep. 653.

(12) 3 M. & S. 167.

(13) 6 T. R. 14. 3 Bos. & P. 42. 44. 6 East, 25. 519. 7 East, 224.

(14) 8 Mod. 172. 1 Bulst. 207.

(15) Whitaker, 35. Prec. Ch. 580. 1 Atk. 235. 6 T. P. 19.

In order to create a lien, it is necessary that the party vesting it should have power so to do. Any party having the absolute disposition of property, may vest in another the right of lien upon it, but not otherwise (1). Liens may be acquired through the acts of servants or agents acting within the scope of their employments (2); but where the act of the servant, agent, or other person in delivering the property is wholly unauthorized, and the pledge of it be tortious against the owner, whether the property be delivered to a tradesman for the execution of the purposes of his trade upon it, or whether it be deposited for bare custody, as a security for a loan made upon it, no lien can be acquired upon it by any such delivery (3). No lien can be acquired by a creditor upon the property of a trader, whether in possession or action, which is delivered by the trader to the creditor with intent to give him a preference in the event of the bankruptcy of the trader (4). But a lien may be acquired where it has been created *bonâ fide*, though the debtor be a bankrupt, provided it be created two calendar months before the date of the commission (5), but not otherwise (6); and a factor can acquire no lien on goods which have been consigned to him after the commission of an open act of bankruptcy. (7)

Requisites of
liens in general.

A party cannot acquire a lien by his wrongful act, and a person obtaining or having the possession of property without the express or implied consent of the owner (8), or by any fraudulent misrepresentation or concealment (9) of facts, or incurring expence thereon without such consent (10), cannot retain it as a lien. Where one person pays the freight or other charges of goods belonging to another, in order to obtain wrongful possession of them, he cannot detain them against the right owner till he is indemnified for these expences (11); and so

(1) 7 Vin. Ab. 74. Co. B. L. 429. 4 Taunt. 807. 1 Jac. 1. c. 15. s. 14. 21 Jac. 1. c. 19. s. 14. 8 T. R. 199.

(2) 9 East, 433. 3 Bos. & P. 119. 3 Esp. 182. 268. 2 East, 227. 4 Taunt. 807. (6) 7 Vin. Ab. 74. Co. B. L. 129. 2 Ves. 285.

(3) 4 East, 174. 5 T. R. 604; and ante, 204. 4 T. R. 260. 7 East, 6. 1 East, 538. 1 East, 337. (7) 8 T. R. 199. (8) 7 Taunt. 278. 2 Stark. 272. 3 T. R. 787.

(4) 4 Burr. 2239. 2457. 3 Ves. 85. 2 Camp. 579. 11 East, 256. (9) 1 Camp. 12. 2 Camp. 597. (10) 2 T. R. 485.

(11) 2 T. R. 487. Stra. 651. 8 T. R. 310. 610. 2 Bla. Rep. 1117. 2 H. Bla. 254. acc. 2 Burr. 2218. cont.

(5) 48 Geo. 3. c. 135. s. 1.

Requisites of
liens in general.

if goods or property be obtained as a security on an usurious contract, they cannot be detained. And though it has been held that the party, to obtain possession, must tender all the money really advanced on the contract (1), that doctrine is no longer law. And a party obtaining possession of property not expressly or impliedly intended by the owner to be detained, or capable of being detained as a lien, in the first instance, cannot detain it afterwards (2). So where goods or property are deposited with a party for a particular purpose, he cannot depart from his trust in neglecting to execute it, and detain such goods as a property or lien for other monies due to him. (3)

In general where the party claiming a lien has entered into a special agreement, or taken another uncollateral security, which is inconsistent with the right of lien, and shews that he never relied upon the lien, but solely upon the personal credit of his debtor, or such other security, there he has no right to retain the property as a lien (4); and therefore, although the general property in goods vests in the vendee by the sale, a lien or a special property continues in the vendor until payment; yet if he enter into such agreement, or take such security with such intent, his lien is gone, and the vendee's right of possession immediately accrues. (5)

Any thing that is tangible, save the person of a party, may be detained as a lien. (6)

In all cases of lien there must be some unsatisfied demand (7), and this demand must be certain and liquidated; and where the amount of it can only be ascertained through the intervention of a jury, there can be no lien in the absence of an express contract to the contrary. There is no lien for demurrage, or for

(1) 1 T. R. 153.

(2) 2 Stark. 273. 7 Taunt. 278. 4 B. & A. 50. 3 T. R. 787.

(3) 6 T. R. 258. 1 N. R. 45. 8 Mod. 306. 16 Ves. 258.

(4) 2 Marsh. 345. 7 Taunt. 24. 2 Selw. N. P. 1322. Whitaker, 47. 5 Ves. 416. Lord Raym. 867. 3 Ves. 70. 16 Ves. 275. 279. 6 T. R. 258. 5 T. R. 488.

1 Esp. 66. 4 Esp. 53. 2 Vern. 117. 8 Mod. 172. 2 Brownl. 254. 1 Stra. 557. 6 East, 25.

4 B. & A. 50. 3 B. & A. 497.

7 Taunt. 14. 2 Marsh. 339. S. C. 3 M. & S. 205. 8 Taunt. 285.

5 M. & S. 180.

(5) Com. Dig. tit. Agreements, B. 3. 5 Ed. 4. f. 2. 17 Ed. 4. f. 1. 3 Barn. & Ald. 497. Vide ante, Stoppage in Transitu.

(6) See 4 B. & A. 466. 2 Camp. 631.

(7) 2 East, 227. Cowp. 251. 1 Esp. 119. 3 Camp. 360. 6 T. R. 258. 2 Moore, 34.

what is termed dead freight (1). If goods are received by a carrier on the road, and the owner is ready at the inn to receive them, the carrier has not a lien either for booking or for warehouse room (2). If a merchant abroad direct his correspondent in England to effect an insurance on goods at sea, and the correspondent employ a broker to effect the insurance, which he does effect in the name of the correspondent, and debit him with the premiums and deliver him the policy, and the merchant abroad pay without notice to the broker the premiums to his correspondent, and the correspondent pay to the broker, with whom he has an open account, a greater sum than was due from the correspondent to the broker at the time the premiums are debited, and the correspondent afterwards deliver the policy to the broker to procure an adjustment of a loss, the broker has not a lien against the foreign merchant for the premiums (3). But a person has a lien upon property placed in his possession as a consideration for his acceptance of a bill which he is liable to pay (4). A factor may become surety for his principal, on condition of having a lien upon property of his principal, as an indemnity against any loss which he may sustain by becoming surety. (5)

Requisites of
liens in general.

In order to complete a lien, there must be a complete possession of the property claimed as a lien. For no lien can be acquired, unless the property on which it is claimed come into the possession of the party claiming it, or of some one who can be considered as his agent for the purpose of receiving it (6); and if a person once part with the possession of his lien, the right of lien is gone, and he cannot revive it by regaining possession (7); and in order to found the lien of a factor, it is necessary that the property upon which it is claimed should have been in his possession, for if goods, after being consigned to a factor, are stopped *in transitu*, no such right vests in him, and the owner may stop them *in transitu*, so as to prevent the factor

(1) 15 East, 554., and see ante, 419. 430. 540. 5. 1 Stark. 123. 2 Stark. 272. 3 Price, 547. 2 Rose, 355. 9 Ves. 115. 1 Rose, 306. 18 Vcs. 188. (2) 1 Esp. 119. 3 Camp. 360. 19 Ves. 235. 1 Atk. 234. To (3) 2 Moore, 34. 2 Camp. 597. entitle wharfingers to a lien, the (4) 2 East, 227. goods should be actually landed (5) Cowp. 251. upon their wharfs, 4 T.R. 260. (6) 7 Taunt. 14. 3 T.R. 119. 1 Blac. R. 413. 423. 783. 2 East, 523. 6 East, 25. (7) See post, 554. 2 T.R. 494. 1 Bro. C.C. 125. S.C. 2 Camp. 579. 1 East, 4. 7 East,

Requisites of
liens in general.

gaining any lien on them, notwithstanding he has accepted bills drawn upon him on the faith of the consignment (1). It has been held, however, that a factor who is in advance to his principal has such an interest upon goods consigned to him, upon which he would have a lien if they arrived, as entitles him to recover upon a general policy on goods, effected by him for his own security (2). But possession, in all these cases, is a mere matter of fact, depending on the nature of each particular case, and it is for the jury to say whether the party is or is not in possession (3). An order by A. to B. directing the latter to pay over to C., a creditor of A.'s, the proceeds of a cargo consigned from A. to B., creates no lien in favour of C. (4). By agreement, however, parties may waive the necessity of taking this actual possession, and cases occur where the agreement may be implied; such as where property is at sea, or there are choses in action, in which the delivery of the muniments or documents of the right of property, and performing other acts, are deemed sufficient to create a lien (5). Where there was an agreement that in consideration of being permitted to draw bills, the drawers should consign goods to the drawees for sale on their account, the latter to receive the usual commission on the sales, and out of the proceeds to indemnify themselves against their acceptances, it was held that the latter, to whom the bills of lading were remitted, were entitled to the goods, though the consignors had become bankrupts before the ship sailed, and their assignees had got possession (6). But the mere deposit of the documents relating to a ship at sea in the hands of a *bonâ fide* creditor, will not confer even an equitable lien upon the creditor against the assignees of the owner, under a subsequent commission (7); and no lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master, unless, upon mistake clearly established, the instrument can be corrected (8), but it may by bill of sale (9). Courts of equity will, under circumstances, frequently give a party such relief, which in effect

(1) 3 T. R. 119. 783. 1 Burr. 489. 494.

(2) 1 Burr. 489. 494.

(3) See 8 Taunt. 648.

(4) 1 Stark. 15. 123. 143. 14 East, 558.

(5) Whitaker, 62. Cullen, 302 to 310. Cooke B. L. ch. 8. s. 11. 1 Atk. 160. 2 T. R. 485. 9 Ves. 417. 1 Stark. 143. 7 Taunt. 278.

3 Esp. 102. 5 Esp. 105. 2 Stark. 175. But possession of such property should be taken by the party

entitled to the lien as soon as possible, 4 M. & S. 240. 2 B. & A. 134.

(6) 1 Bos. & P. 563.

(7) 2 Stark. 175.

(8) 19 Ves. 474. 2 B. & A. 134.

(9) Id.

will amount to a lien, though in fact the party be not impliedly or actually in possession of that whereon he claims a lien, viz. a right to have his demand satisfied out of the produce of the property in preference to any other party. (1)

Requisites of
liens in general.

Property detained as a lien cannot in general be sold, used, or disposed of by the party detaining, unless by the owner's consent (2). Such consent, however, will, under circumstances, be implied; thus, if goods are deposited as a security for a loan of money, such deposit constitutes more than the right of lien, and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit (3); and so, if the thing detained would require use, the detainer may use it, and the owner's consent will be implied; as if the thing detained be a horse, a cow, or a sporting dog, the detainer may use it as a prudent man would his own property. (4) A lien is a personal right, and cannot be assigned unless by agreement between the owner and detainer to that effect (5); but a pawn or deposit may be assigned to the extent of the pawnee's interest. (6)

Rights and liabilities of party claiming a lien.
Power of sale, &c.

The holder of property under a lien is in general subject to the same liabilities and rights as the owner of such property would be if the same were in his possession. The assignee of a policy of insurance on goods, by indorsement on bill of lading, takes it subject to the same lien as existed against the assignor (7); and though a solicitor have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also is the solicitor, the right of lien existing only between him and his client (8), and the rights subsisting between party

(1) 2 Mer. 403. 18 Ves. 187. appraisement of four of his neighbours, sell it, or take it as his own.
1 Atk. 160. 165. 1 Ves. 348. 375.
2 T.R. 490. Cowp. 251. 3 Esp. 3 Bulst. 271. Bac. Ab. tit. Ins.
102. 5 Esp. 105. 1 Stark. 175. (3) Holt, C.N.P. 383.
(2) Holt, C.N.P. 383. 8 Mod. (4) Owen, 123. See ante, 362.
172. 1 Stra. 556. Sel. Ca. 125. (5) 5 T.R. 606. 7 East, 6. Stra.
Yelv. 67. By the customs of London and Exeter, if the owner of a horse neglects or refuses to redeem it from an innkeeper, who holds it as a lien for keep, &c., when such horse has eat out its price, the innkeeper may, upon reasonable (6) Owen, 124. 2 Vern. 691.
1 H. B. 360. Ante, 362.
(7) 2 East, 523.
(8) 2 Scho. & Lef. 115. 279.
2 T. R. 376.

Rights and
liabilities in
general of party
claiming a lien.

and party are paramount to the rights between one of the parties and his attorney (1). Where a person, in pursuance of the directions and authority of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman to whom it is so delivered shall not have any lien upon it against the owner for a general balance due to him from the person who delivered it, on the latter's own account, if the tradesman was informed, at the time he received the property, that it did not belong to such person (2); and upon this rule it has been decided, that a carrier who by the usage of trade is to be paid for the carriage of goods by the consignors, has no right to retain them against the consignee for a general balance due to him from the consignor for the carriage of other goods of the same sort, for the goods became the property of the consignee from the moment of the delivery to the carrier, and therefore could not be liable under any agreement between the latter and a third person (3); and where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also any general balance due from their respective owners; goods having been sent by the carrier addressed to the order of J. S., a mere factor, it was held that the carrier had not as against the real owner any lien for the general balance due from J. S. (4). And if the owner of goods consigns them to a tradesman, for the execution of the purposes of his trade upon them, but before they arrive in the hands of the tradesman the property is transferred by the owner to a third person, who is not able to countermand them till after they are come into the possession of the tradesman, the latter cannot retain them against such third person for a general balance to him from the consignor in other accounts (5). It has been held, that though a traveller has stolen a horse, yet the inn-keeper has a lien against the right owner (6). No claim to a general lien can be established where it would contravene or interfere with the prior common law right of another not claiming under the person from whom the right to the general lien is derived. Thus the right of the consignor of goods to stop them *in transitu* upon the insolvency of the consignee being considered a common law right, and therefore paramount to that

(1) 4 Taunt. 320. 1 Price, 375.
5 Moore, 95. 2 Bos. & P. 28.

(2) 1 East, 333. 2 East, 523.
2 Camp. 218. 597. Peake, C.N.P.
176. 2 Atk. 114.

(3) 2 N. R. 64.

(4) 5 B. & A. 350.

(5) 3 B. & P. 119.

(6) Lord Raym. 866.

of the carrier to retain for his general balance, which can be founded only on special custom, it has been determined that an usage for a carrier to retain goods for the general balance of account between him and the consignee, cannot in any case affect the consignor's right to stop the goods *in transitu*, which the latter may exercise at any time before the consignee has acquired complete dominion over the goods, upon paying the carrier for the carriage only of those particular goods (1); and with respect to equitable liens, as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee (2). A factor, to whom goods have been sent for sale, and who has accepted bills of exchange drawn on him by his principal to the amount of their value, has a lien on such goods, and the purchase money arising by the sale, available against the crown, where the goods or money have been seized by the sheriff under an extent against the principal for a debt due to the crown. (3)

Rights and liabilities in general of party claiming a lien.

In general, a creditor who is entitled to a lien has the same lien against the assignees, under a commission of bankruptcy against the debtor, which he had against the debtor himself; an attorney has the same lien against the assignees which he had against the bankrupt (4). But there is a distinction between the extension of the right of a particular and a general lien after the bankruptcy of a debtor, for the creditor cannot detain goods as against the assignees, after the bankruptcy of his debtor, for a general lien, the claim not being considered as a mutual credit within the 5 Geo. 2. c. 30. s. 28.; and where cloths were deposited by the bankrupt, previous to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed, it was held, in an action by the assignees to recover such cloths, after a tender of the money for dressing them, that the defendant could not detain for his general balance for such work done by him for the bankrupt previous to his bankruptcy, for that there was no mutual credit within the statute 5 Geo. 2. c. 30. s. 28. (5)

(1) 3 Bos. & P. 42. 2 N.R. 64. Ante, 344. 347.

(2) 2 T. R. 485. 490. 1 Atk. 160. 4 M. & S. 240.

(3) 6 Price, 369.

(4) 7 Vin. 74., and see 1 T. R. 619. 1 Ves. 331. 2 Vern. 428.

See ante, 541, 542.

(5) 8 Taunt. 499. 2 Brod. & B. 96. S. C. See also 2 Brod. & B. 89.

How a lien is determined.

A lien exists during such time only as the party has possession, either by himself or his agent, of the property; and if he parts with the possession after the lien has attached, the lien is gone (1). Difficult questions frequently arise as to what will amount to parting possession of the property, so as to deprive a party of his lien. If a vendor of goods unconditionally delivers the whole of the goods sold, he is divested of his lien upon the whole (2). If a creditor part absolutely with the possession of a ship upon which he has a lien, he loses his lien (3); so if the master of a ship part with the possession of the cargo, he loses his lien for freight (4). Where a factor having a lien on goods of his principal for the general balance of his account, gave orders to the warehouseman in whose warehouse they were to deliver them up to a broker, employed by the principal on the occasion, telling the broker at the same time, that the principal intended to sell himself to save commission, and the broker sold them, and made out bills of parcels to the principal, without taking any notice of the factor, it was decided, that such conduct on the part of the factor amounted to the same thing as if he had delivered the goods up in specie to the principal, and that he had therefore lost his lien upon them. (5)

In general, the parting possession of part of a quantity of goods will not deprive a party of his lien on the residue (6). A tailor who is employed to make a suit of clothes has a lien for the whole price upon any part of them (7). A printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers (8). If the consignee of a cargo of barrels of tar, receive the bills of lading made unto order, "he or they paying freight for the said goods," and the consignee assign the cargo before its arrival for a valuable consideration, and upon the arrival of the ship the consignee enter and report it, and the captain deliver to the assignee of the consignee some of the barrels of the tar,

(1) 1 East, 4. Stra. 556. 1 Atk. 254. Ambl. 252. Dougl. 97. 6 East, 25. 1 Burr. 494. 1 Bla. Rep. 114. 1 Stark. 408.

(2) 7 T. R. 64.

(3) 1 Atk. 234.

(4) Abbott, 246.

(5) Ambl. 252.

(6) 3 M. & S. 167. 1 Taunt. 458. Dyer, 29. b. 6 East, 614. 1 Campb. 437.

(7) 3 M. & S. 167.; and see 5 M. & S. 180.

(8) Id.

and such assignee have not sold the tar to different persons, the captain has a lien upon the remainder of the tar for the freight both of the remainder, and of the quantity delivered (1). But the party parting with the possession of part of the goods must not do so in a manner which shews he does not intend unconditionally to part with the whole; thus if a vendor of goods unconditionally deliver nearly the whole of an entire and specific quantity of goods sold, he thereby divests himself of his lien upon the whole or any part remaining in his possession (2); but if the delivery were conditional, and the condition be not performed, he has a lien upon such part as is in his actual possession (3). We have already considered as to what will amount to the delivery of property, so as to divest the right of a party stopping goods *in transitu*: the law in this respect will be here applicable, though indeed rather slighter circumstances of delivery will be sufficient to divest a party's right of lien, than that of stoppage *in transitu*.

How a lien is determined.

In many cases, though the actual possession be parted with, yet there may remain such a constructive possession as will continue the lien; thus, though a shipment by one who has a general lien to the order of the principal is an abandonment of the lien, yet it would be otherwise, were the shipment to his own order (4); so where an agent who has a lien upon property to a certain amount deposits it with a third person as a security to that amount, apprizing him of the lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished (5); and where the holder of a bill of exchange gave the drawee a letter from the drawer, which contained a navy bill, as the fund out of which the bill was to be paid, and which had been given to the holder as a security for the payment of the bill of exchange, and the drawee kept the navy bill, and received the proceeds, it was adjudged, that the holder had not lost his lien on the navy bill by such resignation of possession (6). A factor, by parting with the possession of goods, does not in general forfeit

(1) 6 East, 622.

(2) 7 T. R. 64.

(3) Skin. 647. 12 Mod. 354. 2 T. R. 119. Abbott, 246.

6 East, 618. 3 T. R. 464. 2 Hen.

Bla. 504. 8 T. R. 199.

(4) 1 East, 4.

(5) 7 East, 7. 2 East, 529.

(6) Cowp. 571.

How a lien is
determined.

the benefit of his lien against his principal, where he sells them according to his authority, and he may retain the proceeds or securities gained by the sale (1); but in general a lien upon property in specie is not contained in the proceeds thereof when sold, when the sale was unauthorized (2). An innkeeper does not lose his lien upon the horse of his guest by putting him out to pasture (3); and a party does not in general lose his lien upon property which, by legislative enactments, he is bound to deposit in a certain place, until certain requisites have been complied with (4). A lien cannot be determined by the wrongful act of a third person; and if a person by fraud or force obtain possession of the property whereon a lien is claimed, he cannot divest the right of lien (5).

There are some cases too, where the possession of the property on which the lien exists may be given up to the owner himself, without the lien being divested; thus, if the commodity upon which the party has a lien be of a perishable nature, he may safely part with it to the owner upon a proper agreement with him, that the lien shall await the event of an application to a court of law or equity (6); and where the property upon which the lien exists is delivered up to the owner upon the faith of an assignment, which afterwards turns out to be invalid, it seems the party is still entitled to the benefit of his lien. (7)

A lien may be determined by actual payment or tender of the amount of the legal claim for which the goods are detained, but part payment of such demand is not sufficient (8); neither is a general tender or offer to discharge the claim, without actual tender, or what in point of law will amount thereto, sufficient (9). The entering into an agreement, or accepting of another security not collateral to, but unconnected and inconsistent with the lien, which shews that the creditor placed his reliance for

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| (1) Cowp. 251. 3 B. & P. 449. | (6) Whitaker, 73. 1 Atk. 235. |
| 5 B. & A. 27. | 8 T. R. 199. |
| (2) 10 East, 378. | (7) 2 T. R. 113. |
| (3) 2 Roll. Ab. 85. | (8) 5 T. R. 409. Long on Pers. |
| (4) 1 East, 507. 1 M. & S. | Prop. 148. |
| 147. Ante, 420. | (9) 15 East, 428. |
| (5) See 2 Roll. Ab. 438 | |

security only on such fresh security, discharges the lien, but not otherwise (1). So a lien may be divested, where the purpose for which property was deposited in the detainer's hands has been fulfilled (2). Where the owner of a ship having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, he afterwards negotiated it; it was held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods (3). If a person having a lien upon property, when it is demanded of him claims to detain it upon a different ground, making no mention of the lien, it will be considered as a waiver of it, and trover may be maintained against him, without any evidence of any tender having been made of the amount of his lien (4). Liens acquired without fraud or collusion, before an act of bankruptcy is committed by the person upon whose property they are claimed, are not divested by his subsequent commission of such act, the assignees taking the property subject to the same equitable lien as those under which the bankrupt himself enjoyed it (5); and no lien once fairly acquired shall be divested while the property on which it exists remains in the possession of the party claiming the lien, by the owners aliening the property to a third person; for such person, though a *bond fide* purchaser, must take it subject to the lien. (6)

How a lien is determined.

In general, if a party has once given up the possession of the goods, and lost his lien, he cannot afterwards revive or recover it by stopping them *in transitu*, and procuring them to be re-delivered to him (7), and if the seller of goods parts with the possession thereof, he loses his lien, and it will not be revived by the insolvency of the purchaser who has not paid for the goods (8); but where goods which have been subjected to a general lien have been parted with, yet if they once return into

When revived.

(1) 2 Rose, 79. 2 Ves. & B. 306. 1 Ves. 597. 3 M. & S. 363. 1 M. & S. 535. 7 Taunt. 14. B. & A. 53. 6 T.R. 52. (5) 1 P. Wms. 737. 1 Atk. 94. 162. 232. 2 T. R. 485. 2 Vern. 566. n. l. 46 Geo. 3. c. 135. s. 1. 5 B. & A. 27.

(2) 5 Price, 593.

(6) Burr. 489.

(3) 3 B. & A. 497. 2 Stark. 590. S. C.

(7) 1 East, 4. 1 Stark. 408. 3 Bos. & P. 485.

(4) 1 Campb. 410. 2 Stark. 272.

(8) 1 Stra. 556. 3 P. Wms. 185.

When revived. the same possession in the course of dealing, the lien will be restored, because as the right would attach upon any fresh goods coming into possession, which is the character of a general lien, there seems to be no reason why it should not equally attach upon the same goods back again (1). Where a policy broker, who had a general lien on the policy of insurance, had parted with it, afterwards regained possession of it, it was held that his lien thereby revived. (2)

(1) See Paley, P. & A. 107. 442. Cooke, 579. 1 Atk. 228.

(2) 2 Moore, 34. Co. B. L. Ch. Prec. 580.

CHAP. XII.

Of Mercantile Securities in general.

HAVING in the preceding chapters considered the nature of *contracts* in general (1), and those of most frequent occurrence in commerce, it is now expedient to take a concise general view of the *securities* that may be required and given for enforcing the performance. We have seen that at common law a contract though verbal is generally sufficient (2); and that the exceptions to this rule are principally those introduced by the statute against frauds, (29th Car. 2. chap. 3.) respecting contracts to be responsible for the debt of a third person, not to be performed within a year, or relating to the sale of goods, which must in general be in *writing* (3). But though it was thus sufficient at common law, if there were verbal evidence of the bargain, yet, in many transactions, it has been deemed expedient to have written evidence of the bargain, and in some to have a security under seal, and in others of record, as well for the more satisfactory proof of the contract, as for affording the parties a higher security in case of insolvency or death (4). Many general observations on these different securities and their respective properties have already been made; but it may be expedient here to make a few more particular remarks on some of the most usual securities, such as bills of exchange, promissory notes, bonds, warrants of attorney, and other securities of record.

Upon this voluminous and intricate subject of bills of exchange and promissory notes there are already before the public separate treatises, and therefore a mere analysis of the law on the subject will here be given. Of bills of exchange.

A bill of exchange has been defined to be an open letter of request from one person to another, requiring him to pay on his account a sum of money therein mentioned to a third person (5). Definition.

(1) Ante, 1 to 162.

(2) Ante, 103.

(3) Ante, 275.

(4) Ante, 8, 9, 10.

(5) 2 Bla. Com. 466.

Of bills of
exchange.

It is consequently an assignment to the payee of a debt due to the drawer from the person on whom it is drawn.

General nature
and utility of.

It is a security originally invented among* merchants in different countries, for the more easy and safe remittance of money from the one to the other, and has since been extended to commercial transactions in this kingdom (1). The utility of this instrument will be found in the following instance: thus, if A. live in Jamaica, and owe B., who lives in England, £1,000; now, if C. be going from England to Jamaica, he may advance B. this £1,000, and take a bill of exchange drawn by B. in England, upon A. in Jamaica, and receive it when he comes thither; thus, B. receives his debt at any distance of place by transferring it to C., who carries over the value of his money in proper credit, without the risk of robbery or loss (2). It is in general a preferable security to a formal guarantee, and in some cases it is better than a bond.

Different descrip-
tions of bills.

Bills of exchange are foreign or inland; foreign when drawn by a person abroad, and inland when both the drawer and drawee live in this kingdom. As the object of foreign bills was originally merely for the purpose of commerce, it was formerly thought that they were only valid as between merchant strangers and English merchants; but it was at length established, that all persons, whether traders or not, might be parties to such bills (3). It seems that inland bills were not in use in this country at a much earlier period than the reign of king Charles II., and like foreign bills, it was once thought that they could only be made use of between merchants (4), and bills payable to bearer were at first thought not to be negotiable; but these distinctions have long been held to be without foundation, and as observed by Mr. Justice Blackstone, although formerly foreign bills of exchange were more favourably regarded in the eye of the law than inland, as being thought of more public concern in the advancement of trade and commerce, yet now by various judicial decisions, and by two statutes, the 9th & 10th W. 3. c. 17., and the 3d & 4th Anne c. 9., inland bills stand nearly on the same footing as foreign, and what was the law and custom of merchants with regard to the one, and taken notice of as such, is now by these statutes enacted with regard to the other. There

(1) 2 Bla. Com. 466.

(2) Id.

(3) 2 Lutw. 1585.

(4) 6 Mod. 29.

are, however, still some distinctions between foreign and inland bills; the former, when made abroad, need not be stamped, and must be protested when dishonoured, and may be accepted by parol or by writing on another paper, whereas an acceptance of an inland bill must be in writing on the face of the bill. (1)

Of bills of exchange.

Before we consider more particularly the important practical points relating to bills, it is necessary to inquire briefly into two of the leading properties of this instrument, which constitute the principal distinction between it and every other contract or security. It is an established rule of law, that where a chose in action (that is, the interest in a contract or right, which in case of opposition can only be reduced into beneficial possession by an action or suit) cannot be assigned by the creditor or claimant to a third person, so as to vest the legal interest in the latter, or enable him to sue in his own name; and we have also seen, that it is an established rule, that a simple contract cannot be enforced, unless it be really founded upon some valuable consideration, which must not only be alleged in the declaration, but also be proved on the trial. The principle of the common law rule is, that it would tend to increase maintenance and litigation if the transfer to a stranger of a right not reduced into possession were permitted; and that it would afford means to powerful men to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them (2). It is, however, now established, that bonds and other choses in action may be so far assigned as to vest the beneficial interest in the assignee, and preclude the obligor or other debtor, after notice, from paying the assignor; still, however, the legal interest continues in the assignor, and the action upon the security must be brought in his name, and whatever objection would defeat his claim, will equally affect the assignee (3). So, with respect to consideration, though there be a written undertaking for the performance of a contract, yet, unless it were sealed and delivered as a specialty, it has been clearly established that it is invalid, unless founded upon a valuable consideration; and if the benefit of such a contract be assigned to a third person *bonâ fide*, and

Peculiar properties of bills.

(1) 1 & 2 Geo. 4. ch. 78.

233. b. n. 1. 2 Roll. Ab. 45. b.

(2) Co. Litt. 214. 265. a. n. 1.

(3) 4 T. R. 340.

Of bills of
exchange.

for a valuable consideration, it will nevertheless be equally invalid in his hands (1). But with respect to bills of exchange, these rules do not apply; it is the observation of the learned and elegant commentator on the English laws, that even at the earliest period of our history, the doctrine relating to the assignment of choses in action was found to be too great a clog on commercial intercourse; an exception was therefore soon allowed in favour of mercantile transactions. In the infancy of trade, when the bulk of national wealth consisted of real property, our courts did not often condescend to regulate personalty; but as the advantages arising from commerce were gradually felt, they were anxious to encourage it, by removing the restrictions by which the transfer of interests in it was bound. On this ground, the custom of merchants, whereby a foreign bill of exchange is assignable by the payee to a third person, so as to vest in him the legal as well as equitable interest therein, was recognized and supported by our courts of justice in the fourteenth century, and the custom of merchants rendering an inland bill transferrable was established in the seventeenth century. In short, our courts anxiously attending to the interests of the community, have, in favour of commerce, adopted a less technical mode of considering personalty than realty; and in support of commercial transactions have established the law merchant, which is a system founded on the rules of equity, and governed in all its parts by plain justice and good faith. On the same grounds, it has long been established, that a consideration is not essential to the validity of a bill when it is in the hands of a person who has *bonâ fide* given value for it; and though, as between the original parties, or any person who has not given value, the consideration may be inquired into, the *onus probandi* generally lies on the defendant, and until he can impeach the transaction a sufficient consideration is presumed (2). It is not owing to the form of a bill of exchange, nor to the circumstance of the undertaking being in writing, that the law gives it the effect of a specialty, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities (3). But in order to entitle bills of exchange to these privileges, they must be strictly framed according to the law merchant, and contain all the essential requisites; and if any

(1) 7 T. R. 350. Ante, 63, 64.

(2) 2 M. & S. 325.

(3) Fœnblanque, Treatise on Equity, 1 vol. 344.

of these be wanting, the common law rule against assignment of choses in action, and which requires a consideration, will preclude the holder from recovering. (1)

Of bills of exchange.

The parties to a bill of exchange may be considered with reference to their capacity to contract, the number of persons who may respectively be concerned, and the mode of becoming a party by the intervention of an agent or partner. It was once thought, that, as the only reason why bills of exchange were suffered to be assigned by one person to another, and treated as specialties, was because they were the means of increasing commerce, and facilitating the ends of it, no person who was not a merchant, or engaged in some trade, could be a party to a bill; it has however been long settled, that all persons having capacity and understanding to contract in general, may be parties to these instruments; and, as observed by Lord Mansfield, a person does not make himself a merchant by drawing or accepting a bill of exchange; and therefore an attorney does not, by accepting a bill, lose his privilege from arrest and to be sued. (2)

Of the parties to the bill.

All persons, if they have capacity to contract, and be not subject to any legal disability, may be parties to a bill of exchange. We have already considered what persons have or have not this capacity, and no further observations will be therefore here necessary. (3)

Capacity to be a party.

With respect to the number of parties to a bill, they may be indefinite; in which respect also bills differ from other contracts, to which, in general, there can be only two separately liable. In the inception of the transaction and formation of the bill, there are usually three parties, the party making it termed the drawer, the drawee who after acceptance is called the acceptor, and the payee who after indorsement is called the first indorser. It is not necessary there should be three parties to a bill, for even one would be enough, as a man may draw on himself payable to his own order (4). By the transfer of the bill, the parties may become very numerous; and besides these immediate parties to the bills, a person may become a party in a collateral way, as by an acceptance or payment *supra* protest, after the bill has been dis-

Number of parties.

(1) 1 East, 18.

(3) See ante 11 to 63.

(2) Comerford v. Price, Dougl. 312.

(4) See 18 Ves. 69. Burr. 1077. Carth. 509. 1 Show. 163.

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honoured by the drawee. This also is a strong mark of distinction between bills and other contracts, for with respect to the latter, it is a general rule of law, that no third person can constitute himself a creditor of another *nolens volens*, or can interfere with the contract between others (1); but an exception to this rule has long been allowed in favour of foreign bills, and is allowed also in case of inland bills (2). It proceeds on this principle, that great expence and discredit is incurred by the return of a bill dishonoured, which, by the interference of a third person, who accepts or pays *supra* protest, may be prevented.

The acceptor of the bill is primarily and absolutely liable; the drawer's contract and responsibility is in the nature of a guarantee that the bill shall be duly accepted, and also paid when presented for that purpose, or that in default thereof, and on having due notice of the dishonour, so that he institute proceedings against the drawee, he will pay the bill himself, together with reasonable expences incurred thereon. The indorser's contract and responsibility precisely resembles that of the drawer. The acceptor *supra* protest is liable to all parties, except those for whose honour he accepted the bill; and there is this difference between him and the usual acceptor, that he can support an action, by the custom of merchants, upon the bill after payment of it against those for whose honour he became a party to it.

Mode of be-
coming a
party to.

The observations before made as to the manner in which a person may become a party to a contract, will for the most part be here applicable (3); and it will suffice here to observe, that it is a general rule, that no person can be considered as a party to a bill, unless his name, or the name of his agent, or of the firm of which he is a partner, appear on some part of it. (4)

Of the bill
itself.

We will now consider the points which more particularly relate to the instrument itself, its essential qualities and form: No precise form of words are essential to its validity; it is sufficient that the bill be in writing, and contain a request to pay a certain sum of money at some precise time, or on an event which must certainly happen; but as the only reason why the

(1) 8 T. R. 310.

(2) 1 Term Rep. 269.

(3) Ante, 3.

(4) 3 T. R. 760. 2 Camp. 308.

15 East, 7. 11.

exceptions are allowed to the rules which we have before noticed relative to the assignment of a chose in action, and the necessity for a consideration, are in favour of commercial transactions, we shall find that an instrument, though resembling a bill of exchange in form, will not be valid as such if the payment depend on an uncertain event, or not merely for the payment of money; for it would perplex commercial transactions if paper securities of this nature, incumbered with conditions and contingencies, were circulated, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably take place (1). In these cases the instrument operates only as an agreement, and is not negotiable, and must be stamped as an agreement, and the consideration must be proved; and though the instrument may on the face of it be absolute, yet if by an indorsement the payment is rendered conditional, it cannot be declared upon as a bill or note between the same parties. If, by the terms of the instrument, the payment is to depend on the sufficiency of a particular fund, it will be invalid as a bill of exchange (2); but if the event on which the instrument is to become payable must inevitably happen some time or other, it is of no importance how long the payment may be in suspense; and therefore if a bill be drawn payable six weeks after the death of the drawer's father, or payable to an infant when he shall come to age, specifying the day when that event will happen, it will be valid and negotiable; and there are decisions that if the event on which the payment is to depend be of public notoriety and relating to trade, and there be a moral certainty of its taking place, the bill, &c. will be valid. The bills of exchange therefore called *billa mundinales* were formerly holden to be good, because though the fairs on which the payment of them depended were not always holden at a certain time, yet it was certain that they would be holden. So, if it be payable two months after a certain ship be paid off, or be payable on the receipt of the payee's wages due to him from a certain ship, it has been decided that it is valid. But these cases as to the arrival of a ship, or its being paid off, may now be considered as of questionable authority.

Of bills of exchange.

It would be impracticable to enter into a detail of all the parts of a bill of exchange, and the minute particulars relating to each.

Its parts and requisites in particular.

(1) 5 T. R. 485. *Mainwaring v. Newman*, 2 Bos. & Pul. 125. (2) See cases collected in *Chitty on Bills*, 6 ed.

Of bills of
exchange.

We have indeed already considered most of its principal and important requisites, viz. that it be properly stamped, and that the consideration of it be sufficient. If the stamp be insufficient, or there be a want of consideration, or the consideration be illegal, the bill will not be valid in the hands of any party who was privy to such objections when he took the bill; indeed, if the stamp be insufficient, the bill will be unavailable even in the hands of a *bonâ fide* holder.

Construction
of bills.

Bills of exchange, like every other contract, are to be construed in such a manner as, if possible, to give effect to the intention of the contracting parties; and indeed our courts, sensible how peculiarly conducive the negotiability of these instruments is to the ease and increase of trade, adopt a still more liberal mode of construing them than any other instrument. (1)

The effect of
taking a bill
of exchange.

In general one contract not under seal cannot be extinguished by another similar contract (2), and a mere promise to give time for the payment of a pre-existing debt is not binding (3); but a person, by taking a bill of exchange or promissory note in satisfaction, and not as a collateral security for the payment of a former debt, or of a debt created at the time, is precluded from afterwards waiving it, and suing the person who gave it him, for the original debt before the bill is due, for in general the taking of the bill amounts to an agreement to give the person delivering it credit for the length of time it has to run (4); and even on behalf of the crown, an extent in aid cannot be issued against a person from whom the principal debtor has taken a bill, which is not due (5); but where an action having been brought against the acceptor of a bill of exchange, it was agreed between the parties that the defendant should pay the costs, renew the bill, and give a warrant of attorney to secure the debt, and the defendant gave the warrant of attorney and renewed the bill, but did not pay the costs; it was held, that the plaintiff might bring a fresh action on the first bill, while the second was outstanding in the hands of an indorsee (6); and if the person delivering the

(1) Doug. 277. As to the construction of contracts in general, see ante, 106.

(2) Lord Raym. 1439. Willes, 406. 2 Stra. 1218.

(3) 1 Esp. Rep. 430.

(4) See 6 Barn. & Ald. 14. Esp. 3.

(5) Wightw. 32.

(6) 2 Camp. 329.

bill knew that it was of no value, the holder, on discovering the fraud, will not be precluded from immediately suing such party on his original liability (1). Where one of three joint covenants gave a bill of exchange for a part of a debt secured by the covenant, on which bill judgment was recovered, it was held that such judgment was no bar to an action of covenant against the three, such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact (2); and the taking a bill or note does not prejudice a prior specialty security, so as to preclude the party taking them from recovering interest payable on the specialty (3). Bills, in lieu of which other bills were given, if permitted to remain with the holder, may be sued upon in case the latter bills are not paid (4). When an account for goods sold is settled, and the defendant gives a bill of exchange for the amount, which remains unpaid, it has been holden that the defendant cannot, in an action on the consideration of such bill, go into evidence to impeach the charges in the first account, which has been settled, the giving of the bill being conclusive evidence of the sum due. (5)

Of bills of
exchange.

The effect of taking a bill of exchange or promissory note in satisfaction of a precedent debt, is that the creditor cannot proceed in an action for such debt, without shewing that he has used due diligence to obtain acceptance or payment (6), and also shewing if the defendant was a party thereto, or delivered it to the plaintiff, that the defendant had due notice of the dishonour (7); and it is a good plea in an action for the original debt, that the defendant delivered a bill or note, in payment or for or on account of such debt, and compels the plaintiff to reply that the bill or note has been dishonoured (8); and in an action for the original demand, if it appear in evidence that a negotiable bill or note was given, the plaintiff cannot recover without producing the instrument, or proving that it was destroyed, or

(1) 1 Esp. 5. 12 Mod. 517. R. 40. Finch, Rep. 431.
 6 T. R. 52. 7 T. R. 64. 2 B. & (6) And. 187. 2 Lord Raym.
 A. 329. n. a. 928, 9, 30. 2 Wils. 353. 3 Price,
 (2) 3 East, 251. 538. 4 Esp. 46.
 (3) 2 Ves. & B. 416. (7) 4 Ann. c. 9. s. 7. 3 Taunt.
 (4) 7 Ves. 597. 3 M. & S. 363. 130. Sed vid. 3 M. & S. 362.
 (5) 1 Esp. 159. Sed vid. 1 T. (8) 5 T. R. 513.

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shewing that it was on a wrong stamp (1). It suffices however for the plaintiff, when the bill was received in satisfaction from a third person, and the original debtor, the defendant, was no party to it, to prove the due presentment for acceptance or payment and the dishonour, without shewing that he gave notice thereof to the drawer of such bill, unless the defendant can prove that he sustained some actual loss for want of such notice (2); and if the defendant admit the refusal of the drawee to accept the bill, although he request the creditor to present it again for acceptance, this will be unnecessary, and the creditor may recover his original demand without further proof of the dishonour of the bill (3). We shall hereafter see, that in general when the holder has been guilty of neglect, either in presenting a bill for acceptance when necessary, or for payment, or in giving notice of non-acceptance, or of nonpayment, or by giving time to the acceptor, this conduct will render the original delivery of the bill equivalent to a payment of the debt, and discharge such debtor from all liability (4). In general, when the bill is dishonoured, and the holder uses due diligence, not only the parties to the bill are liable to be sued thereon, but the first liability on the original consideration revives. (5)

Effect of alteration of a bill, &c.

If a bill be altered in any material respect by any holder of it, without the concurrence of the parties, it will totally discharge those parties from responsibility, and even a subsequent *bonâ fide* holder cannot recover, upon it, nor can he, on account of the rule which we have considered, relative to the assignment of a chose in action, recover, except against his immediate indorser even upon the consideration (6). This is a jealous provision of the law to prevent fraud; but where the alteration has been made by a stranger, it will not in general affect the validity of the instrument, if its original form be legible (7). Where an alteration is made with a fraudulent intent, it will amount to forgery (8). But the loss which is most frequently incurred by alteration, arises from the stamp acts; these acts require a stamp

(1) 4 Esp. 159.

(2) 3 M. & S. 362. 5 M. & S. 62. Sed vid. 3 Taunt. 130.

(3) 7 Taunt. 312.

(4) 4 Ann. c. 9. s. 7. And. 187. 2 Wils. 353. 2 Lord Raym. 930.

(5) And. 187. 6 Mod. 147.

2 Lord Raym. 928. 7 Taunt. 312.

3 M. & S. 362. 1 Madd. 89.

(6) 4 B. & A. 197. 4 T. R. 320.

(7) 6 East, 312.

(8) 2 Taunt. 329.

which must be impressed when the bill is framed, consequently it is not competent to the parties after the bill has been once framed and complete by acceptance or negotiation to alter it in any material respect, so as to render it in effect a new contract ; but an alteration in an immaterial respect, as for instance the insertion in the acceptance of the place where the bill is to be presented for payment, will not discharge the acceptor or render a new stamp necessary ; and the correction of a mistake in furtherance of the original intention of the parties, as for instance the introduction in a bill of exchange of the words “or order,” which had been omitted by mistake, will not invalidate the bill, or render a fresh stamp necessary. (1)

Of bills of exchange.

The important points relating to the transfer of a bill may be considered under the five following heads:—1st, What bills are transferrable. 2dly, By and to whom. 3dly, At what time. 4thly, The mode of transfer. 5thly, The nature and operation of the obligation created by the transfer.

Of the transfer of bills.

With respect to the first of these points, viz., what bill is transferrable, we have already seen that the transferrable quality of bills is that which principally distinguishes them from other contracts, and that on account of this property, and of the consequent utility of bills in mercantile transactions, they have been peculiarly favoured by our courts. Hence it has been supposed that unless they possess that quality they would be invalid ; it is not however essential to the validity of a bill as such, that it be transferrable from one person to another (2) ; if indeed it be intended to be negotiable, care must be taken that some operative words of transfer be inserted (3). The usual words inserted are, “pay to my order, or to the order of the payee, or to the bearer,” but no precise form of words appear necessary. Where it is transferrable in the first instance by indorsement, it is absolutely necessary to prove the hand-writing of the first indorser in an action against the drawer or acceptor, and consequently no person but that party or some agent can indorse the bill. If a bill has been made or transferred to several persons, whether in partnership or not, the right of transfer is in all collectively, and not in any individually, though with respect to the mode of

What bills are transferrable.

(1) 3 Esp. 246. 10 East, 433. (2) 6 T.R. 126.
1 Brod. & B. 426. 12 East, 471. (3) 3 Wils. 211. 1 Salk. 132.

Of bills of
exchange.

transfer, when the right is in several persons, it may be put in force by the indorsement of one partner only, in which case the transfer is considered as made by all the persons entitled to make it; and it has been held, that though such persons may not be in partnership, and only one has indorsed, yet that if the drawee accepted after the indorsement, he cannot dispute the regularity of the latter. East India certificates are not indorsable, so as to transfer the legal interest (1); and East India bonds were not transferrable, so as to pass the legal interest to the purchaser, but this has been altered by a late statute (2); but an exchequer bill, the blank in which has not been filled up with any person's name, is transferrable by delivery. (3)

Who may
transfer.

Whoever has the absolute property in a bill or note may assign it, if payable to order. The previous rules and observations relating to the capacity of a party to contract will be here applicable.

Time of transfer.

With respect to the time of transfer, bills are usually indorsed after they have been completely drawn, and before they are due; but with respect to bills above £5 there appears to be no limitation as to the time when they are transferrable; they may even be transferred before they are complete, or before they purport to bear date: thus, if a man indorse his name on a blank stamped piece of paper, such an indorsement will operate as a *carte blanche*, or letter of credit for an indefinite sum consistent with the stamp, and will bind the indorser for any sum to be paid at any time which the person to whom he intrusts the instrument chooses to insert in it (4); and it has been held (5), that a post dated bill may be indorsed by the payee before the day on which it bears date; but where a bill has been presented for acceptance, and acceptance has been refused, and the then holder has been guilty of laches in not giving immediate notice of non-acceptance, any subsequent indorsee, ignorant of the circumstance, will be affected by such conduct of the holder (6). A party taking an overdue bill, and holding it, is subject to all objections which would have affected it in the hands of the ori-

(1) 16 Ves. 450.

(2) 13 East, 509. 51 Geo. 3.
c. 64, as to a navy bill. See Say, 73.
13 East, 515. n. a.

(3) 4 B. & A. 1.

(4) Doug. 514.

(5) 13 East, 517.

(6) 12 East, 434. 2 Camp. 460.

ginal holder. An overdue bill subsequently indorsed is clothed with all the advantages in favor of the party from whom he received it, and therefore it has been decided in an action by a subsequent indorsee against the acceptor of a bill of exchange, that if the person who indorsed it to the plaintiff could himself have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in smuggling, although it was indorsed to the plaintiff after it had become due. (1)

Of bills of
exchange.

With respect to the mode of transfer, indorsements are either in blank, in full, or restrictive. A blank indorsement is effected by the party merely writing his name on the back of the bill. An indorsement in full is so termed because the indorser points out the particular persons to whom he desires the bill to be paid. A restrictive indorsement is where the bill is made payable to a particular person only, and he, by the express terms of the indorsement, is prohibited from negotiating it. An indorsement in blank renders the bill transferrable by the indorsee to any other person, either by indorsement or by delivery. When a bill is transmitted by the post, it may be advisable, to avoid the risk of its getting into improper hands, to fill up, over the handwriting of the first indorser, the name of some confidential person to whom the bill may be transmitted. It has been determined (2), that if A., the payee of a bill of exchange, indorses it in blank, and delivers it to B., who writes above such indorsement "pay the contents to C.," B. is not liable to C. as an indorser of the bill; and Lord Ellenborough, in that case said, "I am clearly of opinion, that this is not an indorsement by the defendants for such purpose; the name of the party must appear written with intent to indorse. We see these words, "pay the contents to such a one," written over a blank indorsement every day, without any thought of contracting an obligation, and no obligation is thereby contracted; when a bill is indorsed by the payee in blank, a power is given to the indorsee of it, specially appointing the payment to be made to a particular individual; this is a sufficient indorsement to the plaintiffs, but not by the defendants."

Mode of
transfer.

With respect to the effect of the indorsement, it transfers the legal as well as beneficial interest in the bill to the person in

Effect of
transfer.

(1) 1 Camp. 383.

(2) 1 Camp. 442.

Of bills of
exchange.

whose favour it is indorsed; in which assignable quality we have seen a bill principally differ from other securities. The obligation which the indorsement imposes on the indorser is exactly similar to that which the drawer of a bill is under, for there is no distinguishing the case of an indorser from that of a drawer; and every indorser is in the nature of a new drawer, every indorsement is a new bill, and that the indorser stands as to his indorsee in the law-merchant the same as the drawer (1); consequently, the instant a bill of exchange is refused acceptance, the indorser may be sued without waiting till the bill according to the terms of it becomes payable. A transfer by delivery without indorsement in general imposes an obligation on the party transferring similar to that of an indorser, with this difference however, that as his name is not on the bill, and there is consequently no privity of contract between him and a remote holder, he is only liable to the person to whom he immediately assigned it, and then not on the bill itself, but only on the consideration of it, and where it clearly appears that the transfer was in the nature of a sale of the bill, the party is not at all responsible, though the bill should not be paid. (2)

Indemnity of
indorser.

If a party indorse a bill for the accommodation of the drawer, which is also accepted by a third person for the like accommodation, such indorser may, after he has been compelled to pay the bill, support an action thereon against the acceptor, or may prove under his commission in case of bankruptcy (3); and such an accommodation indorser, in case there be reasonable ground to apprehend the insolvency of his principal, has an equitable right to withhold the payment of any money which he may owe to him, until he has been indemnified against any liability on account of his indorsement, though such liability would be no defence at law to an action by the principal. (4)

Of the loss
of bills.

We will next shortly consider the consequences of the loss of a bill. Where it is transferrable only by indorsement, and it has not been indorsed by the real party, no person, however *bonâ fide* he may have acted, can acquire any interest in the bill (5). The statute 9 & 10 W. 3. c. 17. provides that if inland bills,

(1) 3 East, 481.

(2) 3 T. R. 757. 3 Ves. 368.

(3) 3 East, 177. 15 East, 220.

(4) 7 T. R. 711. 12 East, 659.

11 Ves. 407. 1 Camp. 12.

(5) 4 T. R. 28.

expressed to be payable for value received, and payable after date, be lost before they are due, the drawer shall give a fresh bill of the same tenor and date on being indemnified. It is not unusual to bring a special action of assumpsit, on a refusal to give such bill. No action at law can be supported against the acceptor of a bill of exchange, note, or check indorsed generally or in blank, so as to be transferrable to a *bonâ fide* holder, and lost before or on the day it is due, although a bond of indemnity has been tendered to the defendant, nor is he liable to be sued on the consideration of the bill; but if it can be proved that the bill has been destroyed, the party who was the holder may recover at law (1); so if the bill has not been indorsed, or if it was only specially indorsed, the party who lost it may proceed by action (2). In *ex parte* Greenway (3), Lord Chancellor Eldon said, that when he was chief justice, he had an action in the Common Pleas upon a bill alleged to be lost, which had been previously indorsed by the payee; an indemnity was offered by bond, but that he nonsuited the plaintiff; that the counsel strongly objected upon the offer of indemnity, and it came before the court on a motion for a new trial, and there was a long discussion on the nature of these indemnities in a court of law; that the court had not come to a decision on it when he left them, and he did not know the result; but that he never could understand by what authority courts of law compelled parties to take the indemnity. The proper course appears to be, that where the bill has been lost, and has been indorsed, and is transferrable by delivery, so that by possibility it may have got into the hands of a *bonâ fide* holder, the draft of a bond of indemnity, with sureties, should be tendered to the parties required to pay for their approbation, after which refusal to pay or to accept the bond of indemnity, a bill in equity should be filed, and the court of equity will direct payment; and it has also been the practice to direct the parties to pay costs, where the indemnity tendered has been insufficient.

We have now to consider when it is necessary to present a bill for acceptance, the nature of an acceptance, the liability of the acceptor, the consequence of non-acceptance of acceptances *supra* protest, with the various important points relating to the

(1) 2 Camp. 211, 212.

(2) 2 Camp. 212.

(3) 6 Ves. 812.

Of bills of exchange.

When necessary to present for acceptance.

payment of a bill, and to the conduct which the holder must pursue upon nonpayment. When a bill is not payable after date, or at a particular certain time, but at a certain time after sight, it is absolutely necessary to present it for acceptance, because otherwise the bill would never become due; and where a bill is payable after sight, it should be presented for acceptance within a reasonable time (1), which must depend on the particular circumstances of each case (2); but in other cases it is not absolutely necessary for the holder to present it for acceptance, and he may keep it till it is due, and then present for payment (3). On a presentment for acceptance the bill may be left for twenty-four hours, unless in the interim the drawee accepts or declares his determination not to do so. (4)

Nature of an acceptance.

With respect to the acceptance itself, it may be considered with relation, 1st, To who may accept; 2dly, At what time it may be made; 3dly, The form and effect of it; and 4thly, The liability of the acceptor and how it may be discharged.

Who may accept.

A bill may be accepted, either by the drawee or by some person *supra* protest, for the honour of the parties, but there cannot be a series of acceptors, or two distinct acceptors of the same bill; it must be accepted by the drawee, or failing him, by some one for the honour of the drawer, &c.; and therefore if a bill of exchange be accepted by the drawee, another person, who for the purpose of supporting his credit likewise accepts the bill in the usual form, is not liable as acceptor, and must be sued on his collateral undertaking, which will not be binding, unless the consideration of the stipulation be stated in writing on the face of such undertaking. (5)

Time of acceptance.

The bill must be accepted within twenty-four hours after it is left, or it may be treated as dishonoured (6). An acceptance, being an absolute undertaking to pay, may be made even after the time appointed by the bill for payment, and after a prior refusal to accept so as to bind the acceptor. (7)

(1) 2 H. Bla. 565.

(2) 2 Smith Rep. 223.

(3) 1 T. R. 713. 5 Burr. 2670. 281.

(4) 2 Smith, 213.

(5) 2 Camp. 447.

(6) 2 Smith, 243. 1 Lord Ray.

(7) 5 East, 514.

The acceptance of inland bills must be in writing on the bill, though in foreign bills it may be either verbal or written on the bill or any other paper (1). In regard to the terms and effect of the acceptance, it may be absolute, conditional, partial, or varying. The holder, however, may in all cases insist on having an absolute acceptance in writing on the face of the bill, and precisely according to the terms of such bill; and therefore in an action (2) on a bill against the drawer of a bill drawn on Lisbon, payable in effective and not in val reals, and the drawee had offered to accept it payable in val denaros, another sort of currency, which was refused, Lord Ellenborough said the plaintiff had a right to refuse this acceptance; the drawee of a bill has no right to vary the acceptance from the terms of the bill unless they are unambiguously and unequivocally the same; therefore, without considering whether a payment in denaros might have satisfied the term effective, an acceptance in denaros was not a sufficient acceptance of a bill drawn payable in effective; the drawees ought to have accepted generally; an action being brought against them on the general acceptance, the question would have probably risen as to the meaning of the term. An *absolute* acceptance is an engagement to pay the bill according to its tenor. The usual mode of making such acceptance is, by writing on the bill the word "accepted" and subscribing the drawee's name, or by writing the word accepted only, and is not unfrequently by the acceptance to make the bill payable at a banker's; but this, since the 1st August 1821, is in effect merely a general acceptance, unless the words "only, and not otherwise or elsewhere," be introduced (3); the effect of which latter acceptance we will hereafter more fully consider. The acceptance may also be *conditional*, rendering the acceptor liable to pay the money only on a contingency. This is permitted, though we have seen that the bill cannot be drawn payable on a contingency (4). A *partial* acceptance arises from the tenor of the bill, either as to the amount of the sum to be paid or the time of payment. In these cases of conditional or partial acceptance, varying materially from the terms of the bill, the holder must, if he intends to resort to the other parties to the bill, in default of payment, give notice to them of such con-

Of bills of
exchange.
Form of accept-
ance.

(1) 1 & 2 Geo. 4. c. 78. 1 East,
105. 4 East, 67. 5 East, 514.

(2) 1 Camp. 425.

(3) 1 & 2 Geo. 4. c. 78.

(4) Willes Rep. 265. 2 Stra.
1212.

Of bills of
exchange.

ditional or partial acceptance, for otherwise such other parties will be discharged. (1)

Liability of
acceptor.

The acceptor of a bill is primarily liable to pay it, and the drawer and indorsers are liable only on his default. It has already been observed, that as the interest of third persons is in general involved in the efficacy of a bill, an acceptance will, when the bill is in the hands of a third person who has given value for it, and who became the holder before it was due, be obligatory on the acceptor, though he received no consideration, and though the holder knew that circumstance; for the very object of an accommodation acceptance is to enable the party accommodated to obtain money from a third person, and therefore the want of consideration furnishes no defence to one who has advanced money on the credit of the acceptor, though he may have been defrauded by the drawer. This engagement is in general irrevocable; but it seems that if he has accepted the bill by mistake, he may cancel his acceptance before the bill has been delivered back to the party who presented it (2). The liability of the acceptor may however be released or discharged, but nothing but an express consent to discharge the acceptor will in general have that effect (3). An accommodation acceptor may be discharged by the holder's giving time to the drawer after having notice that the bill was accepted for his accommodation (4). In the case of an acceptance for the accommodation of the drawer, it is usual to take from the drawer a written undertaking to indemnify him, which, when it is for a sum above £20, should be stamped as an agreement. But where there is any risk of bankruptcy it is advisable to take a counter bill or note, so as to enable the acceptor to prove under the commission against the drawer. In the absence of an express contract, the law implies a contract to indemnify; and it should seem that if an agent has accepted bills for the accommodation of his employer, he may in some cases retain money in his hands to discharge it, unless the bill be delivered up to him, or he be otherwise sufficiently indemnified. (5)

Notice of non-
acceptance, when
necessary.

If on presentment the bill be refused acceptance, it is in general necessary to give immediate notice to the drawer and

(1) 6 East, 200.

(2) 6 East, 199.

(3) Dougl. 247. 1 Camp. 35.

(4) 2 Camp. 185.

(5) 3 Willes, 346. 1 Camp. 12.

indorsers of the dishonour, or they will be discharged from responsibility; and it is not sufficient for the holder to wait till the time mentioned in the bill for payment has elapsed, and then give notice of non-acceptance. The holder may sue the drawer and indorsers, without waiting till the bill be due according to the terms of it (1); and an action lies by the indorsee against the indorsers of a bill of exchange immediately on the non-acceptance of the drawer, though the time for which the bill was drawn be not elapsed (2). This may appear perhaps on the first view to be a harsh rule in its operation against an indorser, who by the default of the acceptor or the drawee is thus liable to be suddenly called on for the payment of the bill long anterior to the time of payment; but when it is considered that the holder of the bill is deprived of all the advantages resulting from the negotiation of it by the circumstance of its being dishonoured, it will be found that it is not unreasonable that he should be at liberty to proceed against all parties. There are various other points which we might here notice, relating to the cases when the want of notice of non-acceptance is excused, and the time and manner of giving notice, and the persons and to whom such notice should be given; but as the same rules for the most part apply also in case of nonpayment, and which more frequently gives rise to questions of this nature, we will postpone the inquiry until we arrive at that part of the subject.

Of bills of
exchange.

When a foreign bill has been refused acceptance, it appears long to have been established that a third person, a stranger to the bill, and even the drawee himself, may accept it *supra* protest (3). This acceptance is made after protest. The subsequent holder of such a bill has an equal claim upon the acceptor, as in the case of common acceptance; but the acceptor himself may, after he has paid the bill, support an action upon it against any party for whose honour he accepted it. (4)

Of acceptance
supra protest.

We will now proceed to consider when a presentment of a bill for payment is necessary, by and to whom such presentment should be made, and the time of such presentment. It would be extremely prejudicial to commerce if the holder of a bill were suffered to give longer credit to the drawee than the bill directs,

Of the present-
ment of a bill for
payment.

(1) 2 Camp. 458.

(3) 5 Ves. 574.

(2) 4 East, 481.

(4) 1 T. R. 269.

Of bills of
exchange.

and afterwards, in default of payment by such drawee, to resort to the drawer or indorsers, at a time when perhaps the account between them and the person liable to them may have been adjusted, or those persons may have become insolvent, and the common law detests negligence and laches. On this principle it is settled that the holder of a bill must present it to the drawee for payment at the time when due, when a time of payment is specified, and when no time is expressed, within a reasonable time after receipt of the bill, and that if he neglect to do so, he shall not afterwards resort to the drawer or indorsers, whose implied contracts are only to pay in default of the drawee, and not immediate or absolute, and who are always presumed to have sustained damage by the holder's laches. It has been holden, that even the bankruptcy, insolvency, or death of the acceptor will not excuse the neglect to make presentment, but that in the first case it should be made to his personal representative; and in case there be no executor or administrator, then at the house of the deceased, or the drawer and indorsers will be discharged. If the holder of a bill, at the time it becomes due, be dead, it is said that his executor, although he have not proved the will, must present it to the drawee. If the drawee goes abroad, leaving an agent in England, with power to accept bills, who accepts this for him, the bill when due must be presented to the agent for payment if the drawee continue absent. (1)

The contract of the acceptor of a bill, and of the maker of a note, being absolute, he cannot in general resist an action on account of the neglect to present the bill at the precise time when due, as an indulgence to any of the other parties; and on the principle that an action is in general of itself a sufficient demand of payment, it has been decided that the acceptor of a bill or maker of a note cannot in general set up as a defence the want of presentment to him even before the commencement of the action; but in case of a promissory note expressed to be payable at a banker's or any other particular place, or where a bill is accepted payable at a particular place *only, and not otherwise or elsewhere*, it must be presented there for payment (2). In case, however, of a bill of exchange, if the words in *italic* are omitted in

(1) 2 East, 206.

(2) Rowe v. Young. 2 Brod. & Bing. 165.

the acceptance, it is to be deemed a general acceptance, and no presentment at the prescribed place will be necessary. (1) Of bills of exchange.

In regard to the time when the bill should be presented for payment, it must, when by the terms of it it is payable on a precise day, be presented on that day, allowing three days grace from the expiration of the time mentioned in the bill, and if the third day of grace fall on a Sunday, Christmas-day, or Good Friday, it must be presented the day before. With respect to checks which are payable on demand, the law has been very uncertain. Thus, in some cases, the keeping of a check or bill, payable on demand, three or five days, was holden not too long, and in another case it was holden that the presentment must be made within two days, and subsequent cases that it should be made the day the bill is received, and that even an hour is an unreasonable time; the opinion of juries of merchants formerly was, that a check on a banker, or a cash note, &c., and payable on demand, ought, if given in the place where it is payable, to be presented to payment the same day it is received, if the distance or other circumstances will allow; but in point of law, as has been observed, there is no other settled rule than that the presentment must be made within a reasonable time, which must be accommodated to other business or affairs of life, and the party is not bound to neglect any other transaction in order to present the check, &c. on the same day he receives it, and it would be unreasonable to suppose that a tradesman should be compelled to run about the town with drafts from Charing-cross to Lombard-street on the same day; and in a late case the judge directed the jury to consider that twenty-four hours was the usual time allowed for the presentment for payment. In another case, where the plaintiff received a banker's note at half past eleven in the morning of the 18th January, and he did not send it for payment till the next day at two, at which time the banker stopped payment, it was holden that the plaintiff was guilty of laches by not presenting it at furthest on the morning of the next day after he received the check; and, according to this case and the current of authorities, it seems now sufficient to present a check or banker's note received on any part of the day early next morning. When the check, &c. is due on demand, and not payable at the place where received, it is said that it should be forwarded for payment by the next

(1) 1 & 2 Geo. 4. c. 78. s. 1.

Of bills of
exchange.

post after it was received; and that where a check, bill, or note of this kind is given by way of payment to a banker, it must be presented by him as soon as if it had been paid into his hands by a customer, and the next time the banker's clerk goes his round. A banker in London, who receives a check by the general post, is not bound to present for payment until the following day. And the holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it; he does enough if he presents it with due diligence to the banker's on whom it is drawn, and gives due notice of its dishonour to those only against whom he seeks his remedy. (1)

Payment.

In many cases the drawee of a bill may be liable to pay over again, when he has paid it to an improper person. Where a bill is transferrable only by indorsement, the drawee must take care that it has been indorsed by the real party; and therefore where the acceptor (2) paid a bill which had been indorsed by a person of the same name, but not the real party, it was held that he was liable to pay it over again to the latter. But where a bill has been duly indorsed by the first indorser, the acceptor will in general be justified in paying it to any person who presents it, unless he had notice that such party is not a *bonâ fide* holder, or that a prior act of bankruptcy has been committed by him. If bankers pay a cancelled check, drawn by a customer, under circumstances which ought to have excited their suspicion and induced them to make inquiries before paying it, they cannot take credit for the amount. (3)

How a party
should act on
the nonpayment
of a bill.

We will now consider what are perhaps in point of practical utility the most important of all the rules relating to bills of exchange, and which from their strictness constitute a material distinction between these instruments and every other contract or security, namely, those relating to the conduct which the holder should pursue on the nonpayment of the bill, and for want of the observance of which it is in every day's experience that the holder loses the benefit of the security in his hands. These rules relate to, 1. When notice of nonpayment is necessary. 2. The time when it must be given. 3. The form and

(1) 2 Camp. 539.

(2) 4 T. R. 28.

(3) 2 Camp. 485.

mode of giving such notice. 4. By whom it should be given. Of bills of exchange.
 5. To whom. 6. The liability of the parties thereupon. 7. The consequence of giving time to, or compounding with the parties.
 8. How far the consequence of the laches, &c. of the holder may be waived.

And first, then, we will consider when it is necessary to give notice of nonpayment. It is an established rule, that in general notice must be given to the anterior parties to the bill, in order that they may respectively take the necessary measures to obtain payment from the parties who are liable to them, and if notice be not given, it is a presumption of law, that the drawer and indorsers are prejudiced by the omission; it is on this principle that notice of non-acceptance and nonpayment are required (1); and the only instance in which the holder is allowed to rebut this presumption of detriment is, that of the want of effects of the drawer in the hands of the acceptor. It has been regretted that even this exception has been allowed as an excuse for the neglect of the holder (2); yet it is established, that a protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of assets between them unascertained at the time, which might then have afforded probable ground of belief to the drawer that his bill would be honoured (3). But it is no excuse for not giving notice of non-acceptance, that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance or afterwards, if he had effects to any amount, however small, in the drawee's hands when the bill was drawn (4); and if the drawer of a bill of exchange when it is presented for acceptance has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they without his privity have appropriated the effects in their hands to the satisfaction of the debt, he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect, under these circumstances, that it would be accepted and paid. (5) The death, bankruptcy,

(1) 2 Bos. & P. 280.

(2) 1 Bos. & P. 654. 3 Bos. & P. 241.

(3) 12 East, 174.

(4) 7 East, 359.

(5) 2 Camp. 503.

Of bills of
exchange.

or known insolvency of the drawee constitute no excuse for the neglect to give due notice of the non-acceptance or nonpayment of a bill either at law or in equity (1).

Time when
notice must be
given.

In regard to the time and mode of giving notice, if it be a foreign bill, it should be protested on the day of the refusal; though the protest may be drawn up within a reasonable time afterwards, provided the bill be noted on the day it was due; notice of the dishonour must be sent by the earliest ordinary conveyance (2). With respect to inland bills, the rules appear to be these; on the day after that on which the bill becomes due, and when it was presented for payment and refused, the then holder must give notice of the nonpayment to the next proceeding party; and it seems now to be established, that where the parties live in London, or in an adjacent village within the limits of the twopenny post, each party has an entire day after that on which he was informed of the dishonour to give notice to his immediate indorsee, and that the notice may be given by letter put in the post-office, however near the residence of the different parties may be, sufficiently early to be received on the day on which he is entitled to notice; and when the parties do not reside in London, it will be sufficient if the party gives notice to his immediate indorser by the next practicable post, after he has himself received notice; and with reference to the principles of the decisions on the first branch of this rule, and for the sake of certainty, it may be considered in all cases sufficient, whether the parties reside in London or elsewhere, if each forward notice on the day after that on which he properly received information of the dishonour of the bill. The notice of non-payment must be given within a reasonable time, which is a question of law, depending, nevertheless, upon the circumstances of each case (3). The general rule, as collected from the cases, on the subject seems to be, with respect to persons living in the same town, that the notice shall be given by the next day, and with regard to such as live at different places, that it should be sent by the next post; but if in any particular place the post should go out so early after the receipt of the intelligence as it would be inconvenient to require a strict adherence to the general rule, then with

(1) 11 Ves. 412. Dougl. 515.
11 East, 117.

(2) 4 Esp. 48. 7 East, 361.

(3) 6 East, 12.

respect to a case so circumstanced, it would not be reasonable to require the notice to be sent the second post. It would indeed far exceed the limits of this work to enter into a detail of the various decisions in this part of the subject; each decision depends on the peculiar circumstances of the case, though indeed, it is governed by the general principle that notice must be given within a reasonable time.

Of bills of
exchange.

The want of immediate notice may be excused by some other circumstances besides the want of effects; thus the absconding or absence of the drawer or indorser may excuse the neglect to advise him, and the sudden illness or death of the holders, or his agent, or other accident, will be an excuse for the want of a regular notice to any of the parties, provided it be given as soon as possible after the impediment is removed (1); and the holder of a bill of exchange is excused for not giving regular notice of its being dishonoured to an indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. (2) The holder of a bill of exchange is also excused for not giving notice of its dishonour in the usual time, by the day on which he should regularly have given notice being a public festival, on which he is strictly forbidden by his religion to attend to any secular affairs (3). Where the traveller of A., a tradesman, received in the course of business a promissory note, which was delivered to the master without indorsing it, and the note having been returned to A. dishonoured, and the latter, not knowing the address of the next preceding indorser, wrote to his traveller, who was then absent from home, to inquire respecting it; it was held that A. was not guilty of laches, although several days elapsed before he received an answer, and gave notice to the next party, as he had used due diligence in ascertaining his address (4). The notoriety of the insolvency of the drawee, even if he be a bankrupt, constitutes no excuse for the neglect of the holder to give notice of non-payment to the drawer and indorsers. (5)

Want of notice
when excused.

In general the notice of non-acceptance or nonpayment should come from the holder, because notice is not required

By whom notice
is to be given.

(1) 2 Camp. 461.

(3) 2 Camp. 602.

(2) 2 Camp. 461. 12 East,
433.

(4) 1 Barnw. & Cresw. 245.

(5) 11 East, 117.

Of bills of
exchange.

merely that the parties of whom the holder received the bill may immediately call on them who are liable to them for an indemnity, but it must purport that the holder intends to resort to them for payment; therefore where the drawer, having notice that the acceptor had failed, gave another person money to pay the bill, and the holder neglected to give notice of the dishonour, it was holden that the drawer was discharged. However, a notice from any person who has a right of action upon the bill, may in general enure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary; and notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorized by him, and not by a mere stranger (1). If the drawer or indorser of a bill of exchange receives due notice of its dishonour from any person who is party to it, he is directly liable upon it to a subsequent indorser, from whom he had no notice of dishonour. (2)

To whom notice
should be given.

The notice of nonacceptance or nonpayment must be given to all the parties to whom the holder means to resort for payment. If the party be abroad, notice should be left at his last place of residence; and if he employed an agent, it should be given to him (3). Notice should be given to every person who has been a party to or responsible for the payment of the bill (4). Though a mere guarantee, not a party to the bill, cannot, it is supposed, insist on the want of notice as a defence, when the insolvency of the principal was well known to him, in which case, his liability is distinguishable from that of a mere indorser. (5)

Of the liability
of the parties
upon nonpay-
ment.

Immediately after receiving notice of nonpayment, when necessary, each of the parties who has received due notice becomes separately liable to pay the principal money and interest; and in the case of a foreign bill, the drawer or indorsers, but not the acceptor, are liable to pay the re-exchange (6). Interest also is recoverable from the drawer and indorsers, in the case of an inland bill without protest. If separate actions be brought against the different parties, each one is liable only for the costs of the action against himself, except in the case of an acceptor,

(1) 2 Camp. 177. 373.

(2) 2 Camp. 473.

(3) 2 Esp. 511.

(4) 2 Taunt. 206.

(5) 8 East, 242. a.

(6) 2 Camp. 445. 12 East, 420.

who applies to stay the proceedings in the action against him, in which case he is, by the practice of the courts, obliged to pay the costs of all the actions; therefore where the actions are numerous, the best course is for the acceptor to suffer judgment by default, in which case he is ^{only} liable for the costs of the particular action against him. Of bills of exchange.

If, when a bill becomes due, the holder give time to the drawer without the concurrence of the other parties to the bill, they will in general be discharged from all liability, although the holder may have given due notice of the nonpayment. This is a rule of law not confined to rules of exchange, and other simple contracts; for if the obligee of a bond, where there is also surety, without communication with the surety, take notes from the principal, and give further time, the surety is not discharged at law (1), though it may be otherwise in equity (2). The drawer and indorsers may be considered in the nature of sureties for the acceptor, therefore, the taking a bond or any security payable at a future day from the acceptor of a bill or maker of a note, without the consent of the other parties thereto, would discharge them from liability; and where the indorsee of a bill having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the residue, with the exception of only a nominal sum, it was holden that he was thereby precluded from afterwards suing the indorser, and the letting such acceptor out of a custody on a *ca. sa.* would have the same effect (3). And if the holder of a bill of exchange when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future day, and that in the mean time the holder should keep the original bill in his hands as a security, such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser who was no party to such agreement, though the drawer might have had no effect in the hands of the acceptor; similar indulgence to a drawer or a prior indorser, would also discharge all subsequent parties. (4) How parties liability will be discharged.

The consequence of a neglect to make a due presentment for acceptance, or for payment, or to give due notice of refusal to How laches may be waived.

(1) *Davey v. Prendergrass*, 5 B. & A. 187. (3) 2 Bos. & P. 61.
 (2) 2 Ves. 540. (4) 8 East, 576.

Of bills of
exchange.

accept or pay, or giving time to the drawee or other parties, may be frequently waived by the conduct of the party, who would otherwise be entitled to resist the payment of the bill, on account of such laches of the holder. Thus, it has been decided, that a payment even of part, or a promise to pay the whole, or to see it paid, or an acknowledgment that it must be paid, made by the person insisting on the want of notice, amounts to a waiver of the consequence of the laches of the holder, and admits his right of action; and where an indorsee, three months after a bill became due, demanded payment of the indorser, who first promised to pay it if he would call again with the account, and afterwards said, that he had not regular notice, but as the debt was justly due, he would pay it; it was held that the first conversation being an absolute promise to pay the bill, admitted that it had been presented for payment in due time, and had been dishonoured, and that due notice had been given of it to the indorser, and superseded the necessity of other proof to satisfy those averments in the declaration, and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonour to the defendant went, which objections he waived (1). So, where the drawer of a foreign bill, upon being applied to for payment, said that his affairs were at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agents were closed, it was decided, that it was unnecessary to prove the protest of the bill (2); and though it seems to have been once considered that a misapprehension of the legal liability would prevent such promise to pay from being obligatory, yet, it appears, that money paid by one knowing or having the means of such knowledge in his power of all the circumstances, cannot, unless there has been deceit or fraud on the part of the holder, be recovered back again, on account of such payment having been made under an ignorance of the law, although the party paying expressly declared that he paid without prejudice; and as an objection made by a drawer or indorser to pay the bill on the ground of the want of notice is *stricti juris*, and frequently does not meet the justice of the case, it may be inferred from this case, and it is now clearly established, that even a mere promise to pay, made after notice of the laches of the holder, would be binding, though the party making it misappre-

(1) 7 East, 231.

(2) 2 Camp. 188.

hended the law (1). If, however, a promise to pay be made without a knowledge of the fact of non-acceptance, or of the laches of the holder, it will not be binding, and even a payment under such circumstances might, if the party making it were prejudiced by the conduct of the holder, be recovered back; the promise also should amount to the admission of the holder's right to receive payment, and therefore, where a foreigner said, "I am not acquainted with your laws, if I am bound to pay it I will," such promise was not considered as a waiver of the objection of want of notice. If an indorser propose to the holder to pay the bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice; and where the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor three months after it was due, said he knew that he was liable, and if the acceptor did not pay it, he would; it was adjudged that he was bound by such promise (2); and such a promise will dispense with the necessity for a protest of a bill (3). But if the drawer or indorser, after having been arrested without acknowledging his liability, merely offers to give a bill by way of compromise for the sum demanded, this does not obviate the necessity of proving notice. (4)

Of bills of
exchange.

A promissory note is an engagement in writing to pay a sum of money at a certain time, or on demand, to a person therein named, or his order, or to the bearer (5). The person who makes the note is called the maker, the person to whom it is payable the payee, and the person to whom he transfers the interest by indorsement the indorsee. Observing on the origin and nature of promissory notes, it has been remarked (6), that as commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment and of obtaining credit, than through the medium of bills of exchange, to which there are in general three parties. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods absolutely necessary, might have so limited a connection with the

Promissory
notes.

(1) 2 East, 469.

(2) 12 East, 38. 2 Camp. 105.

(3) 2 Camp. 188, 9. 2 Camp.
332, 333. 4 Camp. 52.

(4) 2 East, 106.

(5) 2 Bia. Com. 467.

(6) Kyd, 18.

Promissory
notes.

commercial world at large, that he could not furnish his creditor with a bill of exchange on another, but his own responsibility might be such, that his engagement to pay, reduced into writing, might be accepted with the same confidence as a bill on another; hence promissory notes were invented, and now frequently taken. Lord Holt most pertinaciously, contrary to the opinion of other judges, insisted that promissory notes were not valid at common law (1). This was the origin of the statute 3 & 4 Ann. c. 9., which fully established these instruments, and placed them on the same footing as bills of exchange, and consequently the decisions applicable to bills of exchange are equally applicable to them; thus, it was decided, with respect to the time when a note is payable, that there is no difference between bills and promissory notes, and that the latter, when payable at a stated time, are also entitled to three days grace (2); and where the question was, whether or not a note payable out of a particular fund was valid as a promissory note, it was decided in the negative, and the reason assigned was, because promissory notes must stand or fall on the same rule by which bills of exchange are governed (3); though while a promissory note continues in its original shape of a promise of one man to pay to another, it bears no similitude to a bill of exchange, yet when it is indorsed, the resemblance begins, for then it is an order by the indorser upon the maker of the note, to pay to the indorsee; the indorser becomes, as it were, the drawer, the maker of the note the acceptor, and the indorsee the payee; this point of resemblance once fixed, the law relative to bills becomes applicable to promissory notes. (4)

No precise form of words is essential to the validity of a note; thus a note promising to account with another, or his order, for a certain sum of money, is a valid promissory note, though it contain no formal promise to pay (5); but a mere acknowledgment of a debt, from which a promise to pay cannot be reasonably inferred, as for instance, the common memorandum, I. O. U., does not amount to a promissory note, and may be given in evidence under a common count, count for money lent, or on an account stated (6). The same certainty as to the pay-

(1) See 4 T. R. 151.

(2) 4 T. R. 152.

(3) 5 T. R. 486.

(4) 2 Burr. 676.

(5) 8 Mod. 362. 1 Stra. 629.

(6) 1 Esp. 426. 1 Camp. 499.

ment of a sum of money at a certain time is as essential to the validity of a promissory note as of a bill of exchange; they must be payable at all events, and not out of a particular fund, and they must be for the payment of money only, and not for the performance of any other act. In all the points in which the distinction between bills of exchange and promissory notes has been noticed, the rules affecting the former equally apply to the latter, and therefore in a work of this nature, it is unnecessary to make any further observations relating to them.

Promissory
notes.

A bank note, independently of legislative provisions, precisely resembles a common promissory note in all its parts and requisites, except as to the stamp, from which it is exempt. A bank note in effect is a promissory note, given by several individuals under a corporate name, instead of one or more individuals not invested with that character, and it is merely on account of the credit which is universally given to them, that the few peculiar decisions relating to them are to be found in our books depend. It has been observed (1), that these are not like bills of exchange, mere securities, or documents for debts, nor are so esteemed, but are treated as money in the ordinary course or transactions of business, by the general consent of mankind; and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes; they pass by a bill which bequeaths all the testator's money, or cash (2). In bankruptcies they cannot be followed as identical and distinguishable for money; if they be lost, indeed, an action of trover will not lie against the finder by the real owner (3). In a case also on the annuity act, where the whole consideration was described in the memorial as money, and it appeared that only a part of it was money, and the residue bank notes, it was decided on the above principle, that the consideration was well set out (4). Bank notes are assignable by delivery (5). The holder of a bank note is *primâ facie* entitled to prompt payment of it, and cannot be affected by the previous

Bank notes.

(1) Per Lord Mansfield in 551.

1 Burr. 457.

(4) 3 T. R. 554.

(2) 1 Scho. & Lef. 318, 319.

(5) Rep. temp. Hard. 53.

11 Ves. 662. 1 Roper, 3.

9 East, 48. 4 East, 510. Dougl.

(3) 13 East, 130. 135. 1 Camp. 236.

Bank notes.

fraud of any former holder in obtaining it, unless evidence be given to bring it home to his privity (1); but where a bank note for £500 had been fraudulently obtained by some person unknown, and on its being presented for payment some time afterwards, by an agent of a foreign principal, information was given of the fraud, and the principal was desired to inform the bank how he came by it, but the only account he would give of it was, that he had received it in payment of goods, from a man dressed in such a way, of whom he knew nothing, and it was further proved, that bank notes of so large a value were not usually circulated in that foreign country, this was held to be sufficient evidence to be left to the jury to infer the principal's privity to original fraud, in an action of trover brought by his agent to recover it from the bank, who had detained it under the authority of the original owner, to whom it properly belonged, and the question was not altered, the agent who received on account of his having after notice made payments for his principal, which turned the balance in favour of such agent (2). The delivery of a forged bank note in payment of a debt impliedly raises a warranty between the immediate parties that the note is genuine, and the party receiving it, upon discovering the fallacy, may support an action for the amount against the party from whom he received it.

Bankers notes.

Bankers notes are in effect promissory notes, and resemble them and bank notes in every respect, except that they are given by persons acting as private bankers (3). It appears that these notes used formerly to be given by London bankers, whereas they now seem only prevalent among country bankers (4); they, like bank notes when taken in payment, are usually received as cash (5); but if presented in due time and dishonoured, they will not amount to payment (6). So much credit however is not given to them in law as to bank notes, for a tender of the latter, we have seen, is sufficient, unless objected to at the delivery, whereas a tender of bankers notes is insufficient, though it is objected to at the time. On that account (7) these notes are

(1) 13 East, 135.

(2) Id. *ibid*.

(3) 6 Mod. 29.

(4) Sel. N. P. 4 ed. 368.

(5) 1 Lord Raym. 744. Dougl. 635. 7 T. R. 64.

(6) 7 T. R. 64. Lord Raym. 928.

(7) 3 T. R. 554. Ante.

transferable by delivery; they may however be negotiated by indorsement, in which case the act of indorsing will operate as the making of a bill of exchange, and the instrument may be sued on as such against the indorser (1). If the party receiving a banker's note in payment does not, within a reasonable time, present it for payment, he will, in case of nonpayment, have no right of action against the person from whom he received it; but if he uses due diligence in presenting it, and giving due notice of the dishonour, he may recover the amount from that party. (2)

Bankers notes.

Checks or drafts on bankers appear to have been sanctioned and recognized as valid instruments by our courts, previously to the statute of Ann. In point of form, they nearly resemble bills of exchange, and only differ from them in this respect, that they are uniformly payable on demand, and usually to the bearer, and should be drawn upon regular bankers. From their daily and immediate use, the legislature has also considered them in a more favourable light, in the exemption of them in certain cases from stamp duties, for no draft or order for the payment of money to the bearer on demand, bearing date on or before the day on which the same is issued, and at the place where the same is made and drawn on a banker, acting as such within ten miles from such place, is subject to any duty. A check is usually transferred, not by indorsement, but by mere delivery (3). We have already shortly considered the time within which it should be presented for payment. Upon the dishonour of a check, and after due notice given, the holder may sue the drawer, and the immediate party from whom he received it.

Checks.

Having thus considered those securities which are most usually given in the course of commerce, we will now inquire into those securities which, though they are not so frequent, are yet occasionally taken, viz. bonds, warrants of attorney, recognizances, statutes merchant and staple, and in the nature

Bonds. (4)

(1) Lord Raym. 743. 1 Salk.
132. 7 T. R. 430.

(2) 7 T. R. 64.

(3) 7 T. R. 430.

(4) As to specialty securities in general, ante, 6, 7, 8, 9. And see forms post, 4 vol. 7. and 226 to 237.

Bonds.

of a statute staple. These are frequently adopted, either where the credit of the merchant is not so unquestionable, or where, from the prospect of there being more than a single transaction between the parties, it may be desirable to have a more formal security than a bill of exchange or promissory note. With respect to *bonds*, they have already been considered with reference to their peculiar requisites, qualities, and advantages (1). Some of the decisions on bonds given collaterally for facilitating trade, either to bankers for the repayment of advances, or for the replacing of stock and bonds in the faithful performance of the duties of clerk, &c., and the liability of sureties upon such bonds, have also been considered. (2)

Some advantages may result from taking a *bond* as a security, superior to those which the holder of a bill of exchange possesses; they are principally on account of the preference to which they are entitled in the administration of assets upon the death of the obligor, and the circumstance of the heir being liable to the payment of the debt, which he is not upon a bill of exchange or promissory note, or other simple contract (3). Sir Samuel Romilly endeavoured to introduce an act to annul this distinction; but he only succeeded to a certain extent by the statute of 47 Geo. 3. c. 74., by which it is enacted, that if any *trader* die, seised or entitled to any estate or interest in lands, or other real estate which he has not charged by his will with the payment of debts, the same shall in equity be assets for the payment of all his just debts, whether due on simple contract or specialty, and that the heir and devisees shall be liable to the suit in equity of such creditor, provided that creditors holding specialties in which the heir is bound shall be first paid.

We have already in a former chapter noticed some of the requisites and properties of deeds (4), and the distinctions between a simple contract and one under seal (5). The bonds which most frequently give rise to questions connected with trade, are those given to bankers as a security for advances which may be made by them, or for the due accounting of

Bonds to
bankers. (6)

(1) Ante, 6.

(2) Ante, 8 & 9.

(3) Ante, 6, 7, 8, and 9.

(4) Ante, 6.

(5) Ante, 7.

(6) Ante, 309. 4 Taunt. 673.

2 Barn. & Ald. 39. And see forms post, 4 vol. 226, &c.

clerks employed by the obligees, and for replacing stock. In Bonds. the case of bonds given as securities on opening an account with bankers, they should be so framed as to cover advances to be made by the banking house, whatever change of partners may take place, either in the firm accommodated, or in that of the banking house, for otherwise, upon a change by death or otherwise of one of the partners, the bond will be no longer a security for future advances; and therefore, where a bond by A., reciting that B. intended to open a bank account with C., D., and E., as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking house of C., D., and E., it was held, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in, and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation; and Lord Ellenborough C. J. said, "The court will no doubt construe the words of the obligation according to the intent of the parties to be collected from them; but the question is, what that intent was. The defendant's obligation is to pay all sums to them, on account of their advances to Blyth; now who are 'them' but the persons before named, amongst whom is James Walwyn, who then constituted the banking house, and with whom the defendant contracted. The words will admit of no other meaning; and indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made. To the party for whom he is surety, a man may very well agree to make good such advance, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently. The characters therefore of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement. It may be observed, that in one of the cases cited by counsel the words were different from the present case; the clerk was to be taken into the service of the obligees, as a clerk in their shop and counting-house, which might be supposed to mean the same house, however the individual partners may change. But without considering whether that were the true construction of those

Bonds.

words, it is enough to say, that there are no such words here. But we are now desired to construe an obligation to be answerable for money due to them, (certain partners having been before named), to mean money due to any part of them, a construction which would be contrary to the words of the instrument, which it is contended for is, to make this a bond to the persons then constituting the banking house, and their successors, which cannot be admitted (1); but if the bond be given to the banking-house without reference to the names of the firm, it will then operate as a continuing security, whatever change of partners may take place. Thus it has been decided (2), that a bond given to trustees to secure the faithful services of a clerk to the Globe Insurance Company, who were no corporation, may be put in suit by the trustees for a breach of faithful services by the clerk, committed at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer, the intention of the parties to the instrument being apparent to contract for such service, to be performed to the company as a fluctuating body, and the intervention of the trustees removing all legal and technical difficulties to such a contract made with or suit instituted by the company themselves as a natural body."

Bonds to replace stock. (3)

With respect to bonds to replace stock, it has been decided (4), that it is lawful for a person to sell out stock and advance the produce to another on his bond to replace the stock on a named day, and in the meantime pay the dividends which would have accrued due if the stock had not been sold out, though such dividends might exceed legal interest, and though by the fluctuation in the price of stock the borrower might have to pay on the repurchase much more than the sum he received, because in this case the borrower takes the chance of the fall as well as the rise of the funds, and in the former instance he would of course be a gainer, and the lender derives no undue advantage or greater profit than if his money had remained in the funds; but if the stipulation had been, that borrower should

(1) 3 East, 484.; and see
4 Taunt. 673. Ante, 309.

(2) 12 East, 400.

(3) See ante, 311.; and 17 Ves.
jun. 44. And see form, post, 4 vol.

(4) 3 T. R. 531.

repay a sum of money at a fixed day, which in contemplation of Bonds. the parties would in all probability exceed the current price of that day of the same proportion of stock, then the contract would be illegal, because the borrower is not in that case afforded the fair chance of the fluctuation of the funds (1). It was for some time doubted, but has at length been established, that it is not necessary that the party should sell out stock at the time. A stipulation to purchase stock will in general be valid if made in consideration of a pre-existing debt; and therefore, where (2) the defendant being indebted to the plaintiff in £486 4s. 6d., for which he was sued, and the plaintiff wishing to invest the amount of the debt in stock on the 19th of November 1803, when the same would have purchased £908 16s. 7d. stock, in consideration of forbearing his action and demand till the 19th of November 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of £908 16s. 7d. stock, with such interest as the same would have produced as such stock in the meantime, it was held that this was neither usurious nor within the prohibition of the stock-jobbing act, 7 Geo. 2. c. 8.; and the court said that this was not usury, as the amount of the sum to be paid by the defendant depended upon a contingency, and if the stocks had fallen in the meantime to £50, the plaintiff would have received less than his principal and legal interest would have amounted to; that this was no more usury than an agreement to replace stock lent, which, though once contended to be usury if more than the principal and legal interest were obtained thereby, had been long settled to be legal. If, indeed, this had been a mere colour for usury, it would not have availed, but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction. And in another case (3) it was decided, that an agreement for the purchase of stock to be transferred at a further day, at a price below the then value, is not usurious; but if the lender oblige the borrower to take stock at a rate exceeding the market price, it is usurious (4). It has been held (5), that in estimating the measure of damages in an action for breach of an engagement to replace stock on that day, it is not enough to take the value of the stock on that day, if it has risen in the

(1) *Id. ibid.* 11 East, 616.

(2) 8 East, 304.

(3) 5 Esp. C.N.P. 64.

(4) 1 Esp. R. 11. 11 East, 616.

(5) 2 East, 211.

Bonds.

meantime, but the highest value as it stood at the time of the trial, there being no offer of the defendant to replace it in the intermediate time, while the market was rising. And on a bond conditioned for replacing stock, it has been decided (1), that the obligee is not entitled to special damages for a profit he might have made if it had been sooner replaced, unless he shews that he actually would have made it; and it was held, that on a failure to replace stock the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial (2), at the option of the plaintiff, but not the highest price at any intermediate day; and it appearing that the plaintiff gave a bond conditioned to replace five per cent. stock on a given day, after that day government gave the holders of that stock an option to be paid off at par, or to commute their stocks for three per cents.; the plaintiff expressed to the defendant a wish to have the stock replaced that he might be paid at par, but no wish to take three per cent. stock: it was held that he was entitled to recover the price of so much three per cent. stock as he might have obtained in exchange for the five per cents.

Warrants of Attorney. (3)

A warrant of attorney is the next description of security which we are to consider, and though this description of instrument is rarely adopted in the ordinary course of mercantile transactions, yet it frequently occurs where there has been any irregularity on the part of the debtor, or where very considerable advances are about to be made to a party, and he is desirous of giving a speedy and summary remedy to the creditor. A warrant of attorney is not in itself strictly a security, but is an authority addressed to one or more attornies therein mentioned, authorizing them to appear in either of the courts at Westminster, and to confess a judgment in favour of some particular person in an action of debt, and usually contains a stipulation not to bring any writ of error, or file a bill in equity, so as to delay him. This general authority is usually qualified by a written defeazance stating the terms upon which it was given, and restraining the creditor from making immediate use of it. When it is intended to be so qualified, it is the duty of the attorney to indorse the terms of the defeazance, but his neglect to do so did

(1) 2 Taunt. 257.

(2) See 1 Stark. 318.

(3) As to law, ante 10; see form, post, 4 vol. 8.

Warrants of Attorney.

not, until the recent act (1), vitiate the security (2), but now, by that act, in order to give publicity to the transactions and prevent fraudulent preference, if the defeazance be not indorsed and filed within twenty-one days after the warrant of attorney is filed the security is invalid, and all warrants of attorney must be filed within twenty-one days after signed, or execution must be issued within that time, or the same will be void against assignees in case a commission of bankruptcy should issue. This description of security is usually taken on the compromise of an action, but it may be applied to any case whatever; and it is not illegal, or repugnant to the spirit of the bankrupt laws, to give this instrument prospectively in contemplation of future advances of money or credit (3). It has this advantage over a bill of exchange or bond, that instead of its being necessary, as upon those securities, to wait the termination of an action, the creditor has it in his power immediately to sign judgment and issue execution. No action, however, can be supported upon a warrant of attorney, though it may afford evidence of a debt, which shews that it is not in itself a security, but rather the means of completing a security. Every warrant of attorney must be given voluntarily, and for a good consideration (4). If a warrant of attorney be given by an infant (5), or by one of several executors to confess judgment against all (6), the courts will order it to be delivered up to be cancelled; and a joint warrant of attorney to confess judgment by an infant and another may be vacated against the infant only (7). A warrant of attorney given to confess a judgment at the suit of a *feme covert* is void (8). A warrant of attorney given by one partner with the consent of the other is binding on both (9). By the course of the courts a warrant of attorney given to confess a judgment is not revocable, and if the party giving it endeavour to revoke it, the courts will, notwithstanding, give the other party leave to enter up judgment (10). But the death of either party is, generally speaking, a countermand of the warrant of attorney (11), unless indeed he

(1) 3 Geo. 4. c. 39.

(2) 14 East, 576.

(3) 2 T. R. 100.

(4) See Dougl. 196. 3 Taunt.

478. Cowp. 727. 1 B. & P. 270.

1 Taunt. 413. 4 B. & A. 92.

(5) 1 H. Bla. 75.

(6) 1 Stra. 20.

(7) 2 Bla. Rep. 1133.

(8) 2 Wils. 3.

(9) 1 Chit. Rep. 707.

(10) 2 Lord Raym. 766. 850.

1 Salk. 87. 7 Mod. 93. S. C.

2 Esp. R. 563.

(11) Co. Lit. 52. b. 1 Vent. 310..

Warrants of Attorney.

dies in the term when judgment may be signed, or when he dies during vacation, in which case judgment may be signed during that vacation as of the preceding term. (1) Where a warrant of attorney is given to a *feme sole*, who marries before judgment, the authority is not deemed to be countermanded or revoked. (2)

Recognizances, statutes merchant and staples. (3)

We will next consider a species of security which is purely of a mercantile nature, and which was formerly very much in use, but which appears of late years to be scarcely ever adopted, viz. the security of recognizances at common law, and of statutes merchant, statutes staple, and recognizances in the nature of statutes staple. From the peculiar advantages attending these securities, and that which is most particular, viz. the power of the creditor to take in execution at one and the same time the body, lands, and goods of the debtor, it appears rather singular that these securities have fallen into disuse. At common law it appears to have been usual to acknowledge or give a bond or obligation before a judge or other officer having authority for that purpose, and to enrol it in a court of record (4). The original of the acknowledgment of obligations in courts of records at common law was, that there might be no occasion to have the trouble and charge of proving the contract, which was formerly very expensive and difficult as well as dilatory. To save this expence, the acknowledgment was made in courts of justice, and then the court attested the deeds; the contract being thus entered into with such sanctions, did not require proceeding or trial to make it evident (5). The recognizance at common law, which is no more than a bond or obligation on record, may be acknowledged before the several judges in any part of England, and may be entered on record as well out of as in term; so the chancellor or keeper may take recognizances, and award execution, or hold plea of *scire facias* and *audita querela* in the chancery to avoid execution, &c., as the case requires, on all recognizances taken in that court. By the custom of the city of London, the mayor and aldermen, or the mayor singly, may take recognizances; for the

(1) 8 T. R. 257.

(2) 12 Mod. 383. 7 Mod. 53.

(3) As to the law, ante, 10.; see form, post, 4 vol. 9.

(4) 2 Saund. 69. c. d. & 70.

Brook Ab. tit. Recognizance.

(5) See 2 Bac. Ab. 687. 2 Saund. 69. c. d. & 70.

custom is not only reasonable in itself, but, as all other customs of the city, has been confirmed by act of parliament.

Recognizances,
statutes mer-
chant and
staples.

A *statute merchant* is a bond of record acknowledged before the mayor of London, or chief warden of some city or town, or other discreet men chosen and sworn for that purpose, when the mayor or chief warden cannot attend, or before one of the clerks of the statute merchant nominated by the king pursuant to statute of Acton Burnell, 13 Edw. 1. The design of this security was to encourage trade by providing a sure and speedy remedy for merchants, strangers as well as natives, to recover their debts on the day assigned for payment. Afterwards other persons observing that it was much of the same nature as a judgment, but obtained with infinitely less trouble and expence, frequently entered into this species of contract, until by degrees it became a common assurance, though the use of it seems now to have been superseded by warrant of attorney. The addition of the king's seal was to authenticate the security, and to make it of so high a nature, that on failure of payment by the debtor at the day assigned, execution might be awarded without any mesne process to summon him, or the trouble or charge of bringing in proof of the debt. (1)

A *statute staple* is also a bond of record, acknowledged before the mayor of the staple in the presence of the constable of the staple, or one of them, pursuant to stat. 27 Edw. 3. c. 9. To this end the statute requires that there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple, and the seal shall remain in the custody of the mayor of the staple under the seals of the constables (2). This security was also only designed for the merchants of the staple, and for debts on the sale of merchandizes brought there; but in time others began to apply it to their own ends, and the mayor and constables would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple. To prevent this mischief, the parliament, by statute 23 H. 8. c. 6. s. 11., reduced the statute staple to its former channel, and laid a penalty of £40 on the mayor and constables who should extend

(1) 2 Saund. 69. c.

(2) Bac. Ab. Execution, 331, 332.

Recognizances,
statutes mer-
chant and
staples.

the benefit of the statute to any but those of the staple. But though that statute deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of recognizance on 23 Hen.8. c. 6., or a *recognizance in the nature of a statute staple*, so called because this act limits and appoints the same process, execution, and advantage in every particular, as is provided for by the statute staple (1). A recognizance, therefore, in the nature of a statute staple, as the words of the act declare, is the same with the statute staple, only acknowledged before other persons; for as the statute runs, the chief justices of the king's bench and common pleas, or in their absence out of town the mayor of the staple at Westminster, and the recorder of London jointly together, shall have power to take recognizances for payment of debts, in the form set down by the statute (2). It is principally in the mode and time of execution that these securities are preferable to many others upon a statute merchant. If the debtor does not pay, the mayor, &c., before whom it was acknowledged, may seize and sell the goods of the debtor; but if there be no goods, the statute merchant must be certified into the chancery, upon which a writ may be issued to take the body of the defendant, and if it be returned that he is not to be found, then another writ may be issued to take his lands. But the execution upon a statute staple is more immediate and more extensive, for in the first instance, upon the security being certified into chancery, a writ may be issued to take the body, lands, and goods, all in one writ. Another advantage attending the security by statute merchant or statute staple is, that though there be no proceedings for above a year, and though the conusee be dead, no writ of *sci. fa.* is necessary. (3)

(1) Bac. Ab. Execution, 332.

(3) Fitz. N.B. 306. 7 ed.

(2) 23 H. 8. c. 6. sec. 2.

CHAP. XIII.

Of the Remedies for Injuries to Law of Nations and Public Law.—Letters of Marque and Reprisal.—Violations of Safe Conduct.—Insults to Ambassadors.—Piracy, Illegal Captures, and Proceedings in Court of Admiralty.

HAVING completed our inquiries into the mercantile law of nations, and the political regulations of this country by which our commerce is publicly affected, and our investigations of those municipal regulations which relate merely to the private interests of trade, it remains for us to take a concise view of the remedies which are provided for the infraction of the mercantile law of nations, and of those remedies which our municipal law affords for the breach of mercantile contracts.

In the early part of this work we ascertained that the law of nations is a system of rules founded on natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states and the individuals belonging to each. This general rule is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, in time of war as little harm as possible, without prejudice to their own real interests (1). In all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of similar nature, the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So, too, in all disputes relating to prizes and to shipwrecks there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages which are generally approved and allowed of (2). So in the construction of treaties, the law of nations must neces-

Remedy by
war.

(1) Ante, 1 vol. 25, &c.

(2) Ibid.

Remedy by
war.

sarily be resorted to. The violation of this law is of two descriptions, either by one whole nation or the governing power of that nation, or by one or more individuals of a state violating this law, so as to affect the person or the property of the individual of another state. It is the duty of every nation not to suffer any of her rights to be taken away, or any thing which lawfully belongs to her. This right is a perfect one; that is to say, it is accompanied with the right of using force in order to assert it. (1)

From the foregoing rights arise as distinct branches:—First, the right of a just defence, which belongs to every nation, or the right of making use of force against whoever attacks her and her rights. This is the foundation of defensive war. Secondly, The right to obtain justice by force, if we cannot obtain it otherwise, or to pursue our right by force of arms. This is the foundation of offensive war. An intentional act of injustice is undoubtedly an injury; we have then a right to punish it, as we have shewn above, in speaking of injuries in general. The right of refusing to suffer injustice is a branch of the right to security. If, says Vattel, there were a people who made open profession of trampling justice under foot, who despised and violated the rights of others whenever they found an opportunity, the interest of human society would authorize all the other nations to form a confederacy, in order to humble and chastise the delinquents; we do not here forget the maxim, that it does not belong to nations to usurp the power of being judges of each other. In particular cases, where there is room for the smallest doubt, it ought to be supposed, that each of the parties may have some right, and the injustice of the party that has committed the injury may proceed from error, and not from a general contempt of justice. But if by her constant maxims, and by the whole tenor of her conduct, a nation evidently proves herself to be actuated by that mischievous disposition, if she regards no right as sacred, the safety of the human race requires that she should be repressed. To form and support an unjust pretension is only doing an injury to the party whose interests are affected by that pretension, but to despise justice in general is doing an injury to all nations.

(1) Vattel, book 2. c. 5. p. 160.

It is much to be regretted, for the cause of humanity, that there is no jurisdiction by whose decision the disputes of nations can be adjusted without resorting to war. We cannot sufficiently admire the sublime plan of Henry the Fourth of France, who meditated the establishment of a national judicatory for all Europe, where the temple of Themis being always open, the gates of destruction might be for ever closed. The difficulty of accomplishing the project is obvious, and when executed it might perhaps be liable to abuses; but it would have answered a glorious end, and have justly immortalized its author, if in any succeeding age it should have prevented the havoc of a single war. As, however, in the present constitution of the world, no independent state has any superior jurisdiction on earth to which it can resort for justice, the duty of states to observe the law of nations is what is termed by philosophers of imperfect obligation; and when an offence against the law of nations has been committed by one nation to another, and the former will not of itself afford redress, recourse can only be had to war, which is an appeal to the God of Hosts to punish such infractions of public faith as are committed by one independent people against another (1). Where the individuals of any state violate this general law, it is then the interest, as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained; for in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in war. It is therefore incumbent on the nation injured, first to demand satisfaction and justice to be done to the offender by the state to which he belongs, and if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war. (2)

Remedy by
war.

As the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from the subjects of a foreign power, and as such power may, by a vigorous retaliation, be induced to afford redress without occasioning a general war, our laws have in some respects armed the subject with power to impel the prerogative by directing the ministers

Letters of
marque and
reprisal.

(1) Vattel, book 2, c. 5 p. 160. (2) 4 Bla. Com. 68.

Letters of
marque and
reprisal.

of the crown to issue letters of marque or reprisal, upon due demand, the prerogative of granting which is nearly allied to and plainly derived from the king's prerogative of making war, this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal, words used as synonymous, and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking, may be obtained, in order to seize the bodies or goods of the subjects of the offending state until satisfaction be made, wherever they happen to be found. (1) And it has been observed that this custom of reprisals seems dictated by nature herself, for this reason, we find in the most ancient times very notable instances of it; but here the necessity is obvious of calling in the sovereign power to determine when reprisals may be made, else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared, by 5 Hen. 5. c. 7., that if any subjects of the realm are oppressed in the time of truce by any foreigners, the king will grant marque in due form to all that feel themselves grieved, which form is thus directed to be observed;—the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy seal, and if after such request of satisfaction made the party required do not within convenient time make due satisfaction or restitution of the party grieved, the lord chancellor shall make him out letters of marque under the great seal, and by virtue of these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate (2). This practice of granting reprisals is of very general use in ancient and modern ages, and is defended as consonant to the general interests of mankind; for such compulsory process is not allowed to issue till justice is explicitly or impliedly refused, and when that is the case every subject contributes to the wrong done by upholding the government to which he belongs, and increasing to the sufferer the difficulty of redress. Besides that, private persons are answerable with regard to strangers for what

(1) 1 Bla. Com. 258, 259.

(2) See 1 Bla. Com. 259.

the society or governing powers do or owe. But perhaps the best recommendation of reprisals is, that they are calculated to prevent the miseries incident to general warfare. The rigour of the law concerning reprisals is something mollified by the obligation which lies both on the government and individuals, whose refusal of justice occasions such a violent mode of reparation, to reimburse those who by their wrongdoing suffer the loss of property. (1)

Letters of
marque and
reprisal.

The offences against the law of nations which may be committed by individuals, and which are punishable by the law of England, are principally of four descriptions:—1st, Violation of safe conducts; 2dly, Infringement of the rights of ambassadors; 3dly, Piracy; and 4thly, Illegal capture.

With respect to the first, it is clearly established that the violation of safe conduct or passports, expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war, or committing acts of hostility against such as are in amity, league, or truce with us, who have here a general implied safe conduct, these are branches of the public faith without the preservation of which there can be no intercourse or commerce between one nation and another, and such offences are a just ground of a national war, since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as, during the continuance of any safe conduct, either expressed or implied, the foreigner is under the protection of the king and the law, and more especially as it is one of the articles of the Magna Charta, that foreign merchants should be entitled to safe conduct and security throughout the kingdom, there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe conduct. (2)

Violation of safe
conducts.

The rights of ambassadors are established by the law of nations, and are therefore matter of universal concern. These we have considered on a former occasion, so far as they relate to

Insults to
ambassadors.

(1) 2 Woodes. 438.

(2) 4 Bla. Com. 68.

Insults to
ambassadors.

commerce (1). It may here be sufficient to remark, 1st, that the common law of England recognizes them in their full extent, by immediately stopping all legal process sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister, or any of his domestic servants. And the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann, c. 12., that all process whereby the person of any ambassador or of his domestic servant may be arrested, or his goods distrained or seized, shall be utterly void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness before the Lord Chancellor or the Chief Justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges or any two or more of them shall think fit. Thus in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature has intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime. (2)

Piracy.

The third description of injuries which peculiarly affect the commercial law of nations is piracy, and which is defined to be, robbery and depredation upon the high seas without authority from any prince or state. It is piracy, not only when a man robs without any commission at all, but when, having a commission, he destroys those whom he is not warranted to fight, or meddle with such as are *de ligeantiâ vel amicitia* of that prince or state which hath given him his commission of letters of reprisal against the Spaniards, commit intentionally depredations against the French or any other people, the guilt of piracy is incurred. If these violations of property be perpetrated by any national authority, they are the commencement of a public war, if without that sanction, they are acts of piracy. These are the sentiments and practice of antiquity, and the same great line of distinction is adhered to by modern Europe (3). A pirate is *hostis humani generis* (4); as he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state

(1) Ante, 1 vol.

(2) 4 Bla. Com. 70, 71.

(3) Sir L. Jenkins, 1 vol. p. 94.

(4) 3 Inst. 113.

of nature by declaring war against all mankind, all mankind declare war against him; so that every community hath a right by the rule of self-defence to inflict that punishment upon him which every individual would, in a state of nature, have been otherwise entitled to do, for any invasion of his person or personal property (1). By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance, and by an alien to be felony only; but now, since the statute of treasons, 25 Edward 3. c. 2., it is held to be only felony in a subject. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law; but it being inconsistent with the liberties of the nation, that any man's life should be taken away unless by the judgment of his peers, according to the common law of the land, the statute 28 Henry 8. c. 15. established a new jurisdiction for this purpose, which proceeds according to the course of the common law. The great distinction between a seizure as a prize and a piratical taking is, so far as respects commercial questions, that when the piratical taking is clearly ascertained, it becomes a clear and indisputable consequence that there is no transmutation of property, no right to the spoil vests in the piratical captors, no right is derivable from them to any re-captors in prejudice of the original owners; these piratical seizures being wholly unauthorized and highly criminal by the law of nations. In cases of piracy the proper jurisdiction to resort to for redress is the court of admiralty; and that if goods are taken piratically out of a ship, and afterwards sold upon land, a suit may be commenced in this case in the admiralty court against the vendee (2). So if a ship be taken by pirates and carried to Tunis, and there sold, it being originally within the jurisdiction of the admiralty, it so continues, notwithstanding the sale afterwards upon the land. If sold in market overt, the property is divested until conviction (3). But as the question of piracy is rather of a criminal than a civil nature, we will pass from this subject to a question of much greater magnitude and importance; the question, what redress is afforded by law for an illegal capture.

(1) 4 Bla. Com. 71.

(3) 2 Wood 431.

(2) Cro. Eliz. 685. Vent. 308.

Illegal capture,
and proceedings
in admiralty
relating thereto.

In treating of the law of nations, in its relation to commerce, we have fully considered the right of one belligerent to capture and take prize of the property of his opponent, and in what cases a neutral subject, or even the subject of our own state may, by violating the law of nations, or our own political regulations, become liable to seizure (1). Very intricate and difficult questions upon these points frequently occur. It is obvious that, unless there were some court constituted for the purpose of deciding on the legality or illegality of the capture, and if the captor were allowed to be his own judge as to the propriety of the seizure which he had made, war would become a mere system of pillage, and the property of those who ought not justly to be affected by the contest between belligerents would very frequently meet with the same fate as the property of belligerents. The propriety of the capture is not in all cases absolute, but is subject by the law of nations to certain rules, the enforcement of which must be vested in some court of justice. Upon this point, the observations of Lord Mansfield, in a case before him, are very satisfactory (2). His lordship said, "By the law of nations and treaties every nation is answerable to the other for all injuries done by sea or land, or in fresh water, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in the courts of the others, which are all governed by one and the same law, equally known to each. And in order to give effect to what is the law of nations in this respect, the prize acts passed at the commencement of a war usually provide, that ships and goods taken from the enemy, whether by the royal navy or by privateers, must first be condemned in some court of admiralty as lawful prize before any right in point of solid enjoyment can accrue to the captors; and specific directions are prescribed for duly proceeding to such sentence. (3)

Effect of sentence of court of admiralty.

The very necessity which created these courts of admiralty in different countries also rendered it necessary that each country should reciprocally, not merely pay respect to, but consider them-

(1) *Ante*, 1 vol.

(2) *Dougl.* 615.

(3) See 19.*Geo.*3. c.67. 1 *Wils.*

229. 4 *Rob.* 55. 2 *Burr.* 694.

1208. 10 *Mod.* 79. 2 *Bac Ab.*

185.

selves as bound by a regular adjudication in the prize court of another country. In France it appears that their courts do not thus respect the decision of a foreign court of admiralty; but in our country, and in most other civilized states, it is an established rule, that the judgments of the admiralty courts, having competent jurisdiction, are regarded as conclusive upon the subject upon which they have been pronounced in the courts of all other countries, and this is so binding upon the courts of this kingdom, that foreign decisions are considered as conclusive upon the points decided even when they are manifestly unjust. The effect of these decisions we have already considered (1). This doctrine is most clearly elucidated by a judgment of Lord Ellenborough, in a case (2) where he said, "Does not this sentence of condemnation proceed specifically on the ground of infraction of treaty between America and France, in the ship not having those documents with which, in the judgment of the French court, the American was bound by treaty to be provided. I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously, yet having competent jurisdiction to construe the treaty, and having professed to do so, we are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication where the same question arises here upon which a foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty, which negatives the warranty of neutrality. Then having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment."

Effect of sentence of court of admiralty.

In our courts of admiralty the jurisdiction in matters of prize (whether it be coeval with the court of admiralty, or which is much more probable, of a later institution, though beyond the time of memory) is, though exercised by the same person, quite distinct. Such person is appointed a judge of the admiralty by a commission under the great seal, which enumerates particularly, as well as generally, every object of his jurisdiction,

(1) Ante, as to insurance.

(2) 5 East, 104.

Effect of sentence of court of admiralty.

but not a word of prize (1). To constitute that authority, or to call it forth in every war, a commission under the great seal issues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are thereby authorized and required to proceed upon all and all manner of captures, seizures, prize, and reprizals of all ships and goods that are or shall be taken, and to hear and determine, according to the course of the admiralty and the law of nations. A warrant issues to the judge accordingly, the monition and other proceedings are in his name, with all his titles of office, rank, and degree, adding emphatically, as the authority under which he acts, the following words: "and also to hear and determine all and all manner of causes and complaints as to ships and goods seized and taken as prize, specially constituted and appointed."

Of the prize court, and proceedings, &c. therein.

The court of admiralty is called the instance court, the other the prize court. The manner of proceeding is totally different. The whole system of litigation and jurisprudence in the prize court is peculiar to itself; it is no more like the court of admiralty than it is to any court in Westminster Hall. From 8 Eliz. c. 5. it appears, that in civil and marine causes there were many appeals, which the statute restrains to one, to the king in chancery, to be finally decided by delegates. But prize is not a civil and marine cause, and the appeal lies to commissioners, consisting of the privy council. The circumstance of a transaction having taken place upon the high seas does not exclude the jurisdiction of the courts of common law; for seizing, stopping, or taking a ship upon the high sea, not as prize, an action will lie, but for taking as prize no action will lie. The object of a prize court is to suspend the property till condemnation, to punish every sort of misbehaviour in the captors, and to restore instantly *velis levatis* (as the books express it), if, upon the most summary examination, there does not appear a sufficient ground to condemn finally. If the goods really are prize, against every body, giving every body a fair opportunity of being heard, a captor may and must force every person interested to defend, and every person interested may force him to proceed to condemn without delay. These views cannot be answered in

(1) Dougl. 614.

any court of Westminster Hall, and therefore the courts of Westminster Hall never have attempted to take cognizance of the question, prize or no prize; not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject. It is on this account now fully established (1), that the court of admiralty has a jurisdiction exclusive of the common law courts and all others, not only directly upon the question of prize or no prize, but also upon all matters incident to such capture, and consequently that an action will not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted; nor can the propriety of the decision of the matter in the admiralty court be reinvestigated in any collateral proceeding in the courts at Westminster (2).

Of the prize court, and proceedings, &c. therein.

We find it laid down (3), that by the law of nations generally all things are the captor's which he takes from his enemy, or which his enemy gained from another by force of arms; so likewise, all those goods that he shall find in his enemy's custody. But then it must be apparently manifest and evidently proved, that they are really the enemy's; for if an Englishman should have goods in the custody of a dutch factor at Cadiz, and a war should break out between that prince and that republic, yet are not the goods of the Englishman subject to the seizure of the Spaniard, it being apparent that the owner is not a subject of their enemies. So if the goods of friends are found in the ships of enemies, this does not *ipso facto* subject the same to be prize by the law of nations, though it be a violent presumption, and may justly bear a legal examination, till which there may be a securing of the prize till adjudication shall pass (4); so, on the other hand, if the ships of friends shall be freighted out to carry the goods of enemies, this may subject them to be prize, especially if the goods shall be laden aboard by the consent or privity of the master or shipper, though in France they have subjected and involved the innocent with the nocent, and made both of them prize. It is obvious from these decisions, that though the property which is taken may be ostensibly that of the enemy, or liable to seizure, yet very nice questions may arise whether it be

(1) Dougl. 594.
(2) 2 Camp. 420.

(3) Molloy, 2021.
(4) Ante, 1 vol. 440.

Of the prize
court, and pro-
ceedings, &c.
therein.

really so or not. Hence the propriety of requiring the captor to obtain the condemnation of a proper court of admiralty. (1)

A court of admiralty will not in general condemn a vessel whilst lying in a neutral port, and consequently the captured property should be brought into a port of the country to which the captor belongs, or to the port of an ally (2). The first duty of captors, according to the instructions, is to bring their prize to some convenient and safe port, and not an open road where the vessel may be exposed to danger (3). Another material ingredient of convenience will be, that the port shall be of sufficient capacity to admit vessels to enter without unloading their cargoes, since it is the intention of the legislature that bulk shall not be broken. If there is no depth of water to allow a vessel to enter without taking out the cargo, *non erit his locis*, since captors are not to meddle with the cargo in any manner without the authority of the court, which cannot be exercised until the vessel has been brought into port. It is also highly desirable that the port should be a place which holds ready communication with the tribunals, which have to decide on questions arising out of the capture, that the parties may have access to advice, and may be enabled to obtain the necessary information, and that the directions of the court of admiralty may be carried into effect with dispatch. For all these purposes it cannot be supposed that Shetland, for instance, or St. Kilda, could be deemed convenient ports for vessels that have to wait for adjudication in the admiralty court of England. These are the leading points of consideration, and may be deemed indispensable.

On the other hand, there may be conveniencies of a subordinate nature in favour of the captor, which may be also very deserving of attention, when they do not interfere with those of higher moment. For instance, that owners of privateers may elect their own port is but a reasonable advantage in itself, when kept within proper limits, and not suffered to predominate over the interests of other persons, and more especially over those general purposes of public justice to which the court is principally bound to attend. The privilege of electing their own

(1) 4 Rob. 53. 3 Rob. 334.
4 Rob. 43. 5 Rob. 285. 2 East,
473.

(2) 1 Rob. 119. 2 Rob. 210.
(3) 6 Rob. 275 to 278.

ports is a convenience which may be allowed *cæteris paribus*, and it is one in which the court will be disposed to support them, when it does not become the cause of greater inconvenience to others. But the just limits of this personal accommodation are to be distinctly observed; it is not an object to be pursued indiscriminately for the mere profit of agency and commission, in neglect of other considerations of higher and more general importance.

Of the prize court, and proceedings, &c. therein.

The parties who would be prejudiced by the capture and condemnation must in general make a formal claim, though in the absence of any *claim* the court will require the captors to establish at least a *prima facie* case as to the legality of the capture. Where, however, the property claimed is less than £100, for the purpose of avoiding disproportionate expences in small claims, the court will permit property under such value to be restored without the expence of a formal claim (1). But the court refused this indulgence where the property was estimated at £105; and Sir W. Scott said, that it was necessary to confine this indulgence to some definite amount; that whatever was the sum fixed there would be always other sums just exceeding that, which might not be distinguished in principle, at the same time that it was necessary to adhere to the rule laid down. (2)

Claim of the captured property.

With respect to the *evidence* that is adducible either for or against the claim, it is a general rule that no claim shall be admitted in opposition to the depositions and the ship papers. But to this rule there are some exceptions, and it appears from Sir W. Scott's judgment in the case of *La Flora* (3), that in the *Curaçoa* cases the property was described to belong to merchants in Holland, by the deposition of the master, as well as in the ship's papers; yet on proof being made that the real interest belonged to persons in Switzerland, and that it was going under a general course of trade for their actual account and risk, though documented in Dutch names, claims were admitted on behalf of the Swiss proprietors, and that property was finally restored. The court of admiralty is at all times studious to pre-

Evidence relating to the captured property.

(1) 5 Rob. 127.

(3) 6 Rob. 3.

(2) *Id.* 128.

Of the prize court, and proceedings, &c. therein.

serve the simplicity of prize proceedings; and therefore a prayer to admit extraneous evidence on the part of the captor, to shew an illegal course of trade, was refused, there being nothing in the original evidence pointing to such suspicion, because, if remote suggestions were allowed, the practice of the court would be led away from the simplicity of prize proceedings, and there would be no end to the accumulation of proof that would be introduced in order to support arbitrary suggestions. (1)

Damages for wrongful capture or detention.

With respect to *damages*, they are sometimes allowed to the owner of the property when, upon investigation, it appears that the seizure was wholly unfounded, or where the captor has been guilty of some irregularity or want of due care of the property taken as prize. A captor will be justified in the act of seizure, so as not to be liable for damages, where there was not an unreasonable curiosity on his part to make the seizure and bring the question of property to trial, and to take the benefit of any question of law that might arise (2). So where the capture has been adjudged in the event to be unfounded, but to have been *prima facie* justifiable, the captor will not be liable to make good any deficiency in the proceeds of the cargo, if the sale were *bona fide* (3). In the case of the *Betsey* (4), Sir W. Scott laid down the following rule:—"The principal points for our consideration are, whether the possession of the original captors was in its commencement a legal *bona fide* possession? and, 2dly, Whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors, tortious and illegal? For on both these points the law is clear, that a *bona fide* possessor is not responsible for casualties, but that he may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning. This is the law, not of this court only, but of all courts, and one of the first principles of universal jurisprudence. The responsibility of captors does not extend to forcible robbery of goods properly deposited in warehouses under a commission of unlivery; and Sir W. Scott, in a case of this nature (5), after observing on the general liability of bailees, said, "The goods were taken *jure belli*; the captor

(1) 3 Rob. 331.

(2) 6 Rob. 276.

(3) 2 Rob. 132.

(4) 1 Rob. 96.

(5) 6 Rob. 352 to 353.

had a right to bring them in, and if any accident had happened in so doing he would have been excusable, except for want of due care on the part of himself or his agents. When the goods were brought in, they were placed under the custody of the law. It became necessary to take them out of the ship, and the captor obtained a commission of unlivery from the court. They were put into warehouses, and nothing had been advanced to shew that these warehouses were not proper places, and sufficiently secure. The question comes forward, therefore, on the general principle, and on this point I am disposed to think that the captor is not responsible for a loss happening to goods whilst they were under the custody of the law. But it is said that such a rule will operate hardly against the foreign claimant, and that it is not reasonable to address to a subject of another country a justification arising out of the insufficiency of our own police. When you take this property, it is said you are bound to answer for secure keeping. However reasonably you might allege this excuse of robbery in persons living under the protection of the same law, foreigners have nothing to do with the defects of our law, or the execution of it. In my opinion this mode of reasoning is a little too rigorous upon all captors, and indeed upon all countries; for in all countries, under whatever system of police, if thieves break through and steal, the party holding the property is not liable for the loss. This is the universal condition ascribed to things in this world, in every part of it, and not peculiar to any one country, much less to our own." On the same principle it was held (1), that damage sustained during quarantine, owing to the unsuitable nature of the place assigned for quarantine, is not chargeable upon the captor, but will generally be redressed by government. So where restitution has been offered and accepted without qualification, before investigation in the court of admiralty, damages are not recoverable (2); nor are damages recoverable where the seizure has been made under suspicious circumstances (3); nor are damages for the detention of the person incident to capture in general recoverable. (4)

Of the prize court, and proceedings, &c. therein.

But on the other hand it appears, that where there has been no reasonable ground for the seizure, or where the ship has

(1) 5 Rob. 75.

(2) 6 Rob. 236.

(3) 1 Acton, Rep. 113.

(4) 4 Rob. 73.

Of the prize court, and proceedings, &c. therein.

been improperly condemned by a court of admiralty, not having any jurisdiction, the captor is compellable to make compensation for the injury sustained. In the case of the *Lucy* (1), Sir W. Scott decided that where there has been an adjudication that the ship and cargo shall be restored in value, the captor will have to pay the invoice price of the cargo, and £10 per cent. as a fair mercantile profit upon it, to the owner of the cargo, together with freight to the owner of the ship; and demurrage has been given against the captor where the captor delayed restitution, when it was clear that the owner was entitled to it (2). So, though the original seizure may have been *prima facie* justifiable, but in the result otherwise, yet if any damages ensue from the captor's not carrying the ship to a convenient port, he will be liable for them (3); and demurrage has been given against the captor on this account (4). He is liable also for damages for the wilful negligence of a prize master (5); and Sir W. Scott, in a case of this nature (6), said, "This is certainly a very calamitous case, either to the neutral, whose property is destroyed, or to the officers of his majesty's ship, the captors, if they are to answer for the loss which has been sustained out of their own private funds. What makes it more calamitous is this, that the parties themselves, on both sides, appear to be entirely free from every imputation of blame; nothing could be more correct and meritorious than the conduct of the captors, at the same time it is a principle too clear to be doubted, and too stubborn to be bent, that every principal is civilly answerable for the conduct of his agent. The original seizure was made on grounds which the court has held to be justifiable, and the conduct of the parties themselves was perfectly unexceptionable; but under the principle that I have stated, the result of this application will depend on the manner in which their agent conducted himself, if the loss is immediately attributable to him, and the captors are accordingly liable." So in another case (7) damages were given against the captor, owing to a defect of due diligence in not having taken a pilot on board, and restitution in value was decreed.

(1) 3 Rob. 208.

(2) 4 Rob. 74. 185.

(3) 6 Rob. 275.

(4) 5 Rob. 143.

(5) 5 Rob. 357. 3 Rob. 357.

(6) 3 Rob. 129.

(7) 6 Rob. 316.

The marshal of the court of admiralty also is liable to make reparation for the loss sustained by pillage whilst the property was under the care of his subalterns. This was decided in the case of the *Hoop* (1), where the court said, "The credit of the court is concerned in the safe keeping of the property under its protection. If any such property is lost, it is at least the duty of the marshal to be prepared to shew that it was not lost by any default of his. If the fees of the marshal's office are not sufficient to enable him to provide means of security, it should be represented to those who have authority to increase them; but it is not a time to rely upon such a plea, when property under his keeping is alleged to have been already lost."

Of the prize court, and proceedings, &c. therein.

Though it appears to be a mistaken notion that the court of admiralty must in all cases proceed according to the course of the civil law, and can in no case have a trial by jury, yet that mode of investigation is not the ordinary course of proceeding of this court; and where damages are awarded to be paid by a captor, it appears (2) that the court of admiralty has an adequate method of ascertaining the amount of the damages by reference to the registrar, who is authorized to call in the assistance of merchants, who are in that case called assessors; and they usually take the invoice price of goods, and allow a profit of ten per cent. as an ordinary mercantile profit. (3)

Mode of assessing damages.

With respect to *costs*, if there be no reasonable ground for the original seizure, the owner who obtains sentence for restitution will generally also be entitled to *costs*; and where the captor may have been excusable in the original seizure, yet if his subsequent conduct has been incorrect he will be liable to pay the costs of the proceedings (4). On the other hand, though in the result the original seizure may have turned out to be unfounded, and consequently restitution may have been awarded, the captor will be entitled to costs in consequence of his having acted *bonâ fide*, and his having been induced to make the capture by the deceptive conduct of the owner of the vessel (5). This occurred in a case where the cargo in question was coming from Embden to be delivered in London, and

Costs.

(1) 4 Rob. 146.

(2) Dougl. 601.

(3) 3 Rob. 208.

(4) 4 Rob. 193.

(5) 3 Rob. 330.

Of the prize
court, and pro-
ceedings, &c.
therein.

documented as the property of persons at Embden, so as to make it appear as neutral property; and though Sir W. Scott said that the owner of the cargo was entitled to restitution, yet he must award costs to the captors, and said, "If English merchants resort to the expedient of protecting their trade by these false simulated papers, it leads captors into expences for which they ought not to be answerable, but should be compensated by the merchant."

CHAP. XIV.

The Remedies for Breach of Mercantile Contracts in Equity by specific Performance, and Remedies at Law.

THIS chapter will be devoted to the consideration of those remedies which the law affords for the breach of a mercantile contract, where the party guilty of the infraction is supposed to be *solvent*. When he is insolvent a different course of proceeding is frequently necessary, and which will be the subject-matter of investigation in subsequent chapters.

The remedies which our law affords for the infraction of a contract may in some cases be either by compelling in a court of equity the specific performance, or by enforcing in a court of law a compensation in damages. It is the peculiar province of *courts of equity* to compel the specific performance of agreements, when they are affirmative, that is, to perform some act, or to prevent the infraction when the agreement is in the negative, that is to forbear to perform some act (1). There are but few instances of specific performances of agreements being decreed, unless they relate to land or other real property, in which cases a compensation in damages will generally be an inadequate remedy. The general rule is, that a court of equity will not entertain a bill for a specific performance of contracts, relating to the purchase of personal chattels, such as stock in the funds, corn, hops, or other goods; and the reasons assigned are of two descriptions, first, that in general it will be the same thing to the purchaser whether he have this or that man's stock or goods, and therefore, there is no reason why specific performance of the particular contract should be enforced, when an adequate compensation in damages may be recovered at law. The other assigned reason is, that as such contracts relate to articles of merchandize which vary according to different times and circumstances, if a court of equity should admit such bills, a specific performance might perhaps be attended with the ruin of the

I. Remedies in equity by specific performance, injunction, &c.

(1) The history of this jurisdiction is fully stated by Lord Chancellor Erskine in *Halsey v. Grant*, 13 Ves. jun. 76.

In equity, by specific performance.

defendant, when in an action he might not have paid one shilling damages (1). But perhaps another satisfactory reason may be assigned, that equity leaves these contracts to law, because the remedy there is much more expeditious, and in general less expensive; and the courts of equity seem of late rather inclined to limit than enlarge the instances in which they will enforce a specific performance; for there were formerly instances in which an agreement to transfer stock was specifically enforced (2); but Lord Chancellor Eldon said, it is now perfectly settled that this court will not enforce the specific performance of an agreement for a transfer of stock; and this court will not decree a specific performance of an agreement to refer to arbitration (3); and it has no power to decree a specific performance of an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual, for a stipulated remuneration (4). And a specific performance is only decreed where the party wants the thing in specie, and cannot have it any other way. Courts of equity, indeed, have in every instance confined themselves within this line; but this being the general principle, it is seldom deviated from (5). We must not, however, consider it a rule without exceptions, that courts of equity will not enforce the specific performance of mercantile contracts; for contracts respecting mere personal chattels will be enforced in equity where the contract is fair and reasonable, and the damages recoverable at law would not be an adequate compensation for the nonperformance, and where the agreement is in the frame of it incomplete, and intended to be perfected by subsequent articles (6). Thus, where by a memorandum in writing, and signed by the parties, the agreement was for the purchase of several large parcels of wood, consisting of several sorts of timber, standing within a particular place, for the sum of £3,050, to be paid at six several payments during the six ensuing years, and the purchaser to have eight years for disposing of the timber, and that articles of agreement should be drawn and perfected as soon as conveniently could be, with all the

(1) See Newland on Contracts, 89. Sugden's Vendors and Purchasers. Fonblanque on Equity, 80. 151. 3 Woodeson, 464.

(2) 10 Ves. jun. 161., and see 13 Ves. jun. 37.

(3) 19 Ves. 431. See also 1 Wils. Ch. R. 31.

(4) 2 Wils. Ch. R. 157.

(5) 2 Bro. C. C. 341.

(6) 3 Atk. 383. Vin. Ab. tit. Contract, M.

usual covenants therein to be inserted. On a bill by the vendor for the specific performance of the agreement, Lord Hardwick was of opinion, that on the circumstances of the case, such a bill ought to be entertained, thinking it doubtful whether at law he could not have been told this was an incomplete agreement, as the memorandum appeared not to be the contract of itself, but was to be made complete by subsequent articles; so likewise, where two persons enter into an agreement to carry on trade together, and it is specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn one of the parties flies off, upon a bill brought by the other for the specific performance, it will be decreed accordingly (1). So a court of equity has decreed the specific performance of an agreement to sell the goodwill of a trade, and the exclusive use of a secret in dying (2). But a specific performance of a contract of this nature is not granted without great caution (3). Equity will likewise decree the performance of a general covenant of indemnity, though it sounds only in damages upon the principle on which the court entertains bills *quia timet*. Thus, where A. assigned several shares of the excise to B., who covenanted to save A. harmless in respect to that assignment, and to stand in his place touching the payment to the king; upon A. being sued by the king, the former filed a bill against B. for a specific performance of his agreement, which the Lord Keeper decreed, comparing it to the case of a counter bond, where, although the surety is not troubled nor molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt (4). In other cases, likewise, of personal contracts, equity seems to have enforced them on the same principle of *quia timet*. Thus, upon a lease of alum works, with a covenant by the lessee to leave stock of a certain amount upon the premises, there being a fair ground of suspicion that he did not mean to perform his covenant in that respect, a sort of decree *quid timet* was made and affirmed in the House of Lords. In this case an action would not answer the justice of the case, which was a ground on which Lord Hardwicke seemed to think,

In equity, by specific performance.

(1) Ante, 230.

(2) 1 Simons & S. Repts. 74.

(3) See, 1 P. Wms. 181.

Ves. 468. 17 Ves. 335. 2 Madd.

198. 1 Bro. P. C. 234. 5 T. R.

118.

(4) 1 Vern. 189. 1 Bro. C. C.

52.

In equity, by
specific perform-
ance, injunction,
&c.

that if a person should contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, or should contract to sell timber, wanting to clear his land, in order to turn into a particular sort of husbandry, in these cases the performance of the contract in specie ought to be decreed (1). Lord Hardwicke's judgment, in the case of *Buxton v. Lister* (2), discloses the principles on which courts of equity proceed in enforcing specific performance. His lordship said, "This court will not in general enforce specific performance of contracts of stock, corn, hops, &c., for as those are contracts which relate to merchandize that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract to the ruin of one side, when, upon an action, that party might not have paid perhaps above a shilling damage."

As to the cases of contracts for purchase of lands or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade. But however, notwithstanding this general distinction between personal contracts for goods and contracts for lands, yet there are indeed some cases where persons may come into this court, though merely personal; thus, the performance of articles for sale of 800 tons of iron to be paid for in a certain number of years, and by instalments, was decreed. (3)

Injunctions.

Besides this interference of courts of equity to enforce specific performance of an affirmative contract, they will sometimes interfere to prevent the breach of a negative covenant, or a stipulation not to do some particular act (4). But their interposition, so far as respects the subject-matter of the contract, is governed by nearly the same rules as those which regulate their interference in case of an affirmative covenant; and few instances will be found of injunctions restraining the execution of an act relating to acts which would effect real property, or otherwise occasion a permanent injury (5). A court of equity will always proceed with great caution where the effect of their injunction would be to stop a great trading concern. (6)

(1) 3 Atk. 384.

(2) 3 Atk. 382.

(3) *Taylor v. Neville*, cited
3 Atk. 384.

(4) See 1 Wils. Ch. R. 472, 473. n.

Injunctions between coachowners.

(5) 2 Vern. 119.

(6) 19 Ves. 617.

Courts of equity will frequently interfere to prevent the injury to property, though the party claiming relief does not do so upon any contract. Thus, a court of equity will **grant** an injunction against another person from working an injury to a patent (1) or copyright (2). A court of equity will not interfere by injunction to restrain the party from permitting reports written by him to be published by another person; the remedy, if any, being at law (3). So courts of equity will interfere by injunction to prevent a party committing a breach of trust. (4)

In equity, by injunction, interpleader, &c.

So courts of equity will, under circumstances, entertain a bill of interpleader, where there are opposite claims upon property which a third party has in his possession. (5)

Interpleader.

As the court of equity thus affords peculiar remedies, either to compel the specific performance or prevent the infraction of some description of contracts, so, on the other hand, these courts have a peculiar jurisdiction to prevent a party from being sued at law upon a contract unduly obtained (6), and to decree a written contract to be delivered up to be cancelled. Except in the instance of a warrant of attorney, which is an instrument quite the creature of the courts of common law, they have no jurisdiction to order securities to be vacated, and the contracting party must, at the risk of losing the evidence which might establish his defence, wait till the party who holds the security thinks fit to try the validity of the instrument in an action at law, and should he be nonsuited he will still be at liberty to proceed *de novo* upon his security (7); but a court of equity will often decree instruments to be delivered up to be cancelled, although the objection to their validity may be urged at law, for fear that the evidence to impeach them may be lost, or a vexatious use made of them. Thus bills in equity are entertained to have promissory notes delivered up in complicated

Cancelling in equity, &c. securities obtained unduly.

(1) 2 Ves. & B. 218.

(2) See 16 Ves. 269. 17 Ves. 422. 3 Ves. & B. 77. 2 Ves. & B. 19. 1 Jac. & W. 481.

(3) 2 Wils. Ch. R. 157.

(4) 1 Jac. & W. 394. See 8 Price, 631. 1 Simons & S. 124.

(5) 2 Ves. & B. 407. 19 Ves.

204. 5 Madd. 47. 3 Madd. 277. 564. in note.

(6) 2 Ves. & B. 302.; see 8 Price, 631, 689.; see 1 Foul. 43.

(7) See 8 Price, Rep. 534. 3 Merival, 226. Courts of law will grant relief in warrants of attorney on equitable grounds.

In equity, by
cancelling, &c.
securities.

cases (1). Upon the same principle, courts of equity will decree the delivery up of deeds or securities of money, upon which the defendant might against conscience recover at law (2), or will restrain the defendant from negotiating a bill of exchange or promissory note, if it appears that the legal or equitable defence of the plaintiff against the defendant's demand would be defeated by the negotiation (3). So bills will lie to have void policies of insurance delivered up (4), upon this principle, that it is expedient that an instrument should be delivered up, upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it (5). However, in affording this protection, and also in relieving against an usurious contract, a court of equity will impose just and equitable terms upon the party applying for relief, and will compel him to pay what is justly due. (6)

II. Remedies at law.

We will now consider the remedies which are afforded by the courts of *Common Law* for the breach of mercantile contracts; and here we must observe, that in general there is no remedy by action to enforce specific performance in those cases where the subject-matter of the contract is not merely the payment of money. We always find that the language of the jury in finding their verdict is, that the plaintiff shall have money either *eo nomine* or in damages, and the judgment of the court accords with such verdict. The only exception to this rule is the action of detinue, founded on a sale or a bailment, or other contract to deliver or return some specific chattel, in which, at the time of the contract, an interest was vested in the plaintiff (7); but in general, where no interest in a specific chattel is vested in the plaintiff, as where a person has contracted with him to deliver a quantity of malt or corn not separated from a greater bulk, he can only proceed for damages, and cannot recover any specific chattel. With respect to this pecuniary satisfaction, which the common law courts thus afford, instead

(1) 7 Ves. 20.

(2) 3 Bro. Ch. R. 15.

(3) Amb. 66. 3 Bro. C. R. 476.

(4) 1 Eq. Cas. 371. Prec. Chan. 20. 2 P. Wms. 170.

(5) 7 Ves. 21. 2 Anst. 454.

(6) 5 Ves. jun. 604. 1 T. R. 153. 1 Taunt. 413. 9 Ves. 84.

4 B. & A. 212.

(7) Dyer, 24. b. 1 Chitty on Pleading, 120.

of the thing itself, it may be of three descriptions, either a Remedies at law. penalty, stipulated damages, or general undefined damages.

With respect to penalties, there appear to be two classes of Of penalties. cases, the one of penalties in bonds conditioned for the performance of one or more acts, and where the obligee must proceed for the penalty, and the other of penalties contained in other deeds or agreements, where the party is at liberty either to proceed for the penalty or for the damages which he has sustained by the breach of the stipulation. In the case of a bond in a penal sum conditioned for the performance of one or more acts, if there be a breach of the condition the only proceeding at law is an action of debt for the penalty. In this case, though it was formerly held otherwise, the obligee or creditor cannot recover beyond the extent of the penalty, though the real damages should greatly exceed it (1); though if judgment should be obtained on such security, such judgment may carry interest beyond the penalty of the bond (2). On this ground, in an action of debt on a bastardy bond, the court made an order, that on payment of the penalty and costs all proceedings should be stayed (3). Nor will a court of equity afford relief beyond the provisions of the contract, and therefore a court of equity will not assist the obligee beyond the penalty, though the principal and interest greatly exceed it (4). Where, however, the debtor himself seeks relief, he will be compelled to pay interest exceeding the penalty (5), as where he seeks to be relieved against an elegit; and even though the debtor be not the plaintiff seeking relief against the legal right of his creditor, yet if the latter has been prevented from recovering his debt by vexatious delay, these circumstances might constitute an exception to the general rule, and be a reason for giving relief beyond the penalty (6). At common law, upon breach of the condition of a bond the penalty became the debt, and the party, though ready to pay the just debt, might be taken in execution for such penalty, and the party was compellable to resort to a court of equity for relief. This gave rise to the stat. 8 & 9 W. 3. c. 11. s. 8., by which it is enacted, that in an action on a bond, or any other penal sum, in case of a judgment by default, or on demurrer, the plaintiff shall execute an

(1) 6 T. R. 303. 1 Saund. 58. a.

(2) 1 East, 436.

(3) 2 Bla. Rep. 1190.

(4) See cases collected in Newland on Contracts, 330.

(5) 3 Atk. 517.

(6) Newland, 335.

Remedies at law. inquiry, in order to ascertain the damages really sustained; and in case of a trial of any issue upon the pleadings connected with such bond, the plaintiff shall not issue execution for more damages than he has ascertained to be due by the finding of such jury; so that the penalty in a bond, or in any other agreement, is by this statute reduced merely to a security, and is no longer the measure of damages to be recovered. Where there are several acts stipulated to be performed at a future period, the judgment is to stand as a security, and the plaintiff may from time to time issue a *scire facias* to recover damages for any fresh breach, together with the costs of the proceeding by *scire facias*.

The second class of penalties is that which is frequently inserted in deeds and agreements not framed as bonds, and where the principal object of the contract is the performance or observance of some act, and the penalty is only in the nature of a further security for the due performance of the contract. Although the statute of William, which we have just considered, in this case also precludes a party from recovering more damages than he really has sustained, yet he has an election to proceed in either of two modes. He may proceed upon any one breach by action for the penalty, in which case it will stand as a security to that extent for future breaches, and the judgment being docketed, will bind the land, and be entitled to a preference in the administration of assets, in case of the death of the contracting party. But if it be probable that the damages really sustained will exceed the penalty, either in respect of the breach already committed, or from breaches that may in future happen, the better course is to waive the penalty, and proceed for the recovery of damages; in which case damages beyond the penalty may be recovered, either in one action, or in successive actions for repeated breaches (1). In cases of this nature the plaintiff has his election to bring an action for the damages, or debt for the penalty; if he brings debt for the penalty he cannot afterwards resort to the covenant, but if he bring an action for damages for breach of the contract, he may recover more than the penalty. (2)

(1) 13 East, 343. Hoff, C.N.P. (2) Id.
46. Sed. vide 1 Camp. 78.

With respect to the second description of compensation, that of *stipulated damages*, it is sometimes difficult to determine what has been the precise meaning of the parties, and whether the sum named in the contract was intended by them as a penalty or as the sum really to be paid (1). In a case on this subject (2), where in an agreement, after a variety of stipulations on both sides, there was the following stipulation: "And lastly, it was thereby agreed on, by and between the said parties, that either of them neglecting to perform that agreement according to the tenor and effect, and true intent and meaning thereof, should pay to the other of them the full sum of £200 of lawful money of Great Britain, to be recovered in any of his majesty's courts of record at Westminster;" and the question for the decision of the court was, whether upon one breach of this stipulation the £200 was to be considered as stipulated damages, or as a penalty, and the court held that it must be considered as the latter; and Mr. Justice Heath said it is very difficult to lay down any general principle in cases of this kind; and I think there is one which may be safely stated, where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. And Mr. Justice Chambre stated, as another rule, that where payment of a smaller sum was secured by a larger, the latter shall always be considered as a penalty. So if a party agrees not to do some specified act, under a penalty of £100, such sum cannot be treated as liquidated damages (3). The effect of inserting stipulated damages, either at law or equity, appears to be, that both parties must abide by the stipulation, and the prescribed sum must always be given (4). It in general prevents a party from filing a bill for specific performance, unless to prevent the execution of some act which would occasion permanent injury, as in the instance of ploughing up ancient meadows. In general, however, in a contract for purchase, the inserting a proviso, that if either party break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty, and consequently a specific perform-

Remedies at law.
Stipulated damages.

(1) Ante, 390 & post. 4th vol. page 3.

(2) 2 Bos. & P. 346.

(3) 2 Bos. & P. 340. 3 Bos. & P. 630. 13 East, 345. 1 H. Bla. 227.

(4) Holt, C.N.P. 46. Newland, 313.; but see 5 Taunt. 247.

Remedies at law. **ance will be decreed in the same manner as it would have been in case no such proviso had been inserted, and though the defendant may wish to forfeit the penalty, yet a specific performance will be decreed. (1)**

Unliquidated damages.

With respect to unliquidated damages, the precise amount of which can only be ascertained by a jury, they must in a great measure depend upon the particular circumstances of each case; we shall find that the law does not in every case afford complete redress, but proceeds upon a general rule found to be most convenient in practice. Thus, if A. stipulate to pay B. £1,000 on a named day, and in the faith of the fulfilment of such engagement B. makes engagement to pay other sums to his creditors, and in consequence of the nonperformance of his contract is arrested, and compelled to pay costs, he cannot recover such costs or damages from A. (2) The rule seems to be, that only such damages shall be recoverable as are naturally incident to the nonperformance, or at least were pointed out to the contracting party at the time the contract was made, as the certain result of his breach (3). Thus, if A. contract to deliver goods, and the market price advances, and he neglects to perform his contract, damages may be recovered equal to the general advanced price of the commodity; and if A. were informed at the time of the contract, that B. had entered into some sub-contract, the execution of which would be prevented if A. failed in performing his contract, then, if the purchaser should be obliged to pay damages to the party with whom he made the sub-contract, such damages would be recoverable from A.; and in an action for breach of a warranty, the purchaser may recover the costs of an action against him upon a sub-warranty (4). This rule as to the allowance of damages proceeds upon the difficulty that would arise in the investigation of possible profits or losses, which might incidently happen on the nonperformance of a contract.

Of arrest.

We have now to consider the cases, where a party may be *arrested* in an action, and where proceedings against the contracting party, on the ground that he is about to become fugitive, or a *foreign attachment*, can be supported; and first, with respect

(1) Atk. 371. 1 Stra. 533.

(3) 7 Taunt. 153. 2 Marsh.

(2) *Lovell*, 235. Lex. Merc. 431. 5 Taunt. 247. Holt, C.N.P. 461. Posth. Ab. 65. 12 T. R. 52. 43. 3 B. & P. 351.

2 Camp. 445.

(4) *Id. ibid.*

to arrest. In most foreign countries, the cases in which an arrest on mesne process in the commencement of an action, are much more limited than in this. In France no arrest was allowed, except in the case of a bill of exchange, or other express contract to pay a sum certain, and when by the terms of the contract the party had so far admitted a sum to be payable as to raise a presumption that it was scarcely disputable. In our country the law of arrest has undergone a singular change; formerly a party was only liable to arrest where he had been guilty of some trespass or tort, and no arrest was allowed in an action for a debt; but now an arrest is not allowed in general, unless the action be for a debt; and a creditor cannot arrest his debtor, unless the debt amount to £15 or upwards, (or on a bill or note for £10), and an affidavit of the existence of it be made before the issuing of the process (1). It would be impracticable in a treatise of this nature, to enquire into the whole doctrine of arrests; it may suffice to observe, that the object is either to imprison the party till judgment has been obtained, and he can be charged in execution, or in case he can find bail, to obtain the security of two persons who stipulate to pay the sum that shall be adjudged to be due from him, or render his body in pursuance of a writ of *capias ad satis faciendum*, or that the bail will pay the debt and costs.

Remedies at law.
Arrest.

There is a custom in the city of London, by which security in the nature of bail may be obtained by a creditor for a debt not yet due, by his swearing that his debtor is about to become fugitive, and procuring four other persons to swear to the same effect, upon which the debtor will be compelled to give security to pay the debt when it becomes due. This custom is peculiar to the cities of London and Exeter (2); it is purely of a local nature, and does not authorize a person, as it has been sometimes supposed, in arresting a party by process out of the courts at Westminster before the debt is actually due. Where a party has purchased goods on credit which has not elapsed, and has been guilty of fraud, there may be cases in which an arrest may be justifiable and legal before the expiration of the stipulated credit; but in general, unless a clear case of fraud can be proved, it would be illegal to proceed before the expiration of the credit,

Arresting a fugitive debtor for better security.

(1) 51 G. 3. c. 124. s. 1. 12 Geo. 1. c. 29. 5 Geo. 2. c. 27. 21 Geo. 2. c. 3. 19 Geo. 3. c. 70. (2) See Emmerson's Practice of the Mayor's Court, 62. 6 T. R. 760. 3 Stra. 993. Lord Raym. 743.

Remedies at law.

and would probably subject the party to an indictment for perjury, or to an action for a malicious arrest (1). But this premature proceeding is no ground of nonsuit in proceedings by bill, provided the credit elapsed before the title of the declaration. In cases, therefore, where a trader is manifestly insolvent, and he has committed an act of bankruptcy, and is likely to squander his property before the credit has elapsed, the only course of proceeding that is strictly regular is to strike a docquet against him, and make him a bankrupt. (2)

Foreign attachment. (3)

The custom of *foreign attachment* in the mayor's or sheriff's court of London and Exeter (4), and some other places, has also been considered in the nature of bail to compel the appearance of a debtor (5); it is however in practice a more expeditious and efficacious proceeding than an ordinary action. By this custom, if B. be indebted to A., and C. to B., A. may attach in the hands of C. the debt he owes to B.; so that unless B. finds bail to answer A.'s claim, A. may obtain from C. the amount of the debt due to B., and C. will thereby be discharged from liability to B. (6). And, as if there be no opposition the attachment may be completed in a very few days in the mayor's court, this proceeding is exceedingly advantageous, especially against foreigners (7). The custom has been certified to be, "that if A. affirm a plaint in the court of the mayor or the sheriff of London against B., and it be returned *nihil*, and thereupon A. suggests that C., a person within the city (8), is a debtor to B., C. shall be warned, and if he does not deny himself to be indebted to B., the debt shall be attached in his hands (9)." It is necessary that the third person, or garnishee, should be within the city (10); but though it has been supposed otherwise (11), it is not necessary that the original debt should

(1) 1 Esp. Rep. 430. 4 East. 95.

(2) 4 East, 95.

(3) As to foreign attachment in general, and course of proceeding, see Com. Dig. Attachment, D. Bac. Ab. Hen. Bla. 1 Saund. 67. n. 1. 3 East, 367. Jacob, Dic. tit. Attachment.

(4) 1 Leon. 321. Com. Dig. Attachment, A.

(5) 1 Saund. 67. n. 1.

(6) 1 Taunt. & Bing. 491.

(7) Com. Dig. Attachment, A.

(8) 2 H. B. 362.

(9) 22 Ed. 4. 30. b. 1 Rol. Ab. 554. pl. 4. Godb. 400. 1 Saund. 67. n. 1. Com. Dig. Attachment, A.

(10) Com. Dig. Attachment, D. 2 Hen. Bla. 362. 2 Chitty's Rep. 438.

(11) 1 Saund. 67. n. 1. Com. Dig. Attachment, D. In a proceeding abroad, in the nature of a foreign attachment, if the defendant were absent, and left no authorized agent to appear for him, the proceeding would be void, 9 East, 192.

have arisen within the jurisdiction, or that the defendant residing within it be actually summoned (1), for if the latter were necessary, the principal utility of this custom against foreigners would be defeated; and therefore, as in proceeding by two writs of *scire facias*, on a judgment or against bail, the supposition of an actual summons is mere fiction, but still the record of the proceedings must regularly suppose the summons on the defendant, and his default, or they will be irregular. (2)

Remedies at law.
Foreign attachment.

A foreigner, as well as a subject, may adopt this proceeding (3); and the plaint may be against an executor or administrator for a simple contract debt (4); and the circumstance of the plaintiff having an action depending in a superior court for the same debt, constitutes no objection to the proceeding (5); but if there be an action depending against the garnishee for the recovery of the debt due from him, it cannot be attached (6); and money awarded under a rule of court, or directed to be paid by the allocatur of the master of the court of king's bench, is governed by the same rule (7). An attachment cannot be made for a debt not completely due (8); and it is at least doubtful, whether a party can attach money in the hands of himself and partner (9). As to the debt or property which may be attached in the hands of the third person or guarantee, any debt due from him to the defendant, and money or goods, jewels, chests, and boxes locked, bonds, bills of exchange, and choses in action, whether due or not, may be attached (10); but not trust-money in the hands of the garnishee, or for proceeds of goods held in trust for a third person (11), nor money which the garnishee has engaged to pay over to another person (12); and one mode of trying whether an attachment would be valid is to put this question,—could the defendant, in the mayor's court, have brought an action against the garnishee, for the property at-

(1) 5 Taunt. 228. 1 Marsh. 33.
S. C. 3 East, 367. 2 Chitty, Rep.
438.

(2) 1 Saund. 67. n. 1.

(3) Dyer, 196. Lut. 984. Com.
Dig. Attachment, B.

(4) 1 Rol. 105. Com. Dig.
Attachment, 599.

(5) Cro. Eliz. 593. Com. Dig.
Attachment, B.

(6) 1 Rol. 552. b. 45. Cro.
Eliz. 101. 157. 3 Lcc. 210. Com.
Dig. Attachment, D.

(7) 4 T. R. 312.

(8) Cro. Eliz. 184. 713. 3 Lcc.
236. Lutw. 984. 1 Rol. 553.
Jones, 406. Com. Dig. Attach-
ment, D.; but see id.

(9) 4 B. & A. 646. 1 Brownl.
& G. 60. Com. Dig. Attachment,
C.

(10) Com. Dig. Attachment, C.

(11) Com. Dig. Attachment, D.

1 Marsh. 226. 5 Taunt. 558.

(12) 4 Campb. 177.

Remedies at law.
Foreign attachment.

tached? for if not, then the attachment could not be available (1). An invalid attachment cannot constitute a defence to an action against the garnishee by the party legally entitled to the property, so that a garnishee, who is in the nature of a stakeholder, should, in some cases, file a bill of interpleader, when he is proceeded against by foreign attachment, and also by action. (2)

The course of proceeding is more expeditious and less expensive in the mayor's court than in the sheriff's (3). The plaintiff is personally to swear to the debt for which he would issue the attachment, and not by attorney (4). The plaintiff finds common pledges to prosecute his plaint, and thereupon process issues by a summons, directed to the serjeant at mace, to summon the defendant, and it is returned that the defendant has nothing whereby he can be summoned; thereupon a suggestion is entered, that C. is indebted to the defendant; a precept goes to the serjeant to attach the money in the hands of C., and after four defaults by the defendant, a *scire facias* issues against C., and if he acknowledges the debt, or suffers judgment against him by default, as is most usual, and the plaintiff finds real pledges to return the money or goods attached in case the defendant should disprove the original debt within a year and a day, the plaintiff has judgment and execution for the money in the hands of C., and shall acknowledge satisfaction for it upon the record (5). If there be judgment for recovering against the garnishee, but no execution, the plaintiff may afterwards sue his debtor, and he shall sue the garnishee (6); and as the garnishee is not obliged to pay the plaintiff before execution issued, a payment before will not be deemed compulsory, nor deprive the defendant of the right to sue the garnishee; and a mere transfer in books is not a valid payment. (7)

(1) 5 Taunt. 558. 1 Marsh. 232.

(2) 5 Taunt. 558. 1 Marsh. 226.

(3) Com. Dig. Attachment, A. 1 Saund. 67. n. 1.

(4) Lutw. 985. Jones, 406. 1 Rol. 554. l. 10. Com. Dig. Attachment, A.; but the custom to swear need not be pleaded. 5 Taunt. 234., where see form of a plea.

(5) Com. Dig. Attachment, A. Lutw. 980. 985. See the other proceeding, in case the garnishee disputes the debt, and where the defendant appears before or after execution against the garnishee, Com. Dig. Attachment, E., &c.

(6) 1 Rol. 555. l. 5.

(7) 4 Moore, 172. 1 Brod. & B. 494.

Any person may put in a claim to the goods attached, by filing what is termed a *bill of proof*; the plaintiff in the action then prays in what manner the party claiming the goods has a right to claim them, and thereupon a statement of the claim or *probation* is filed, and the claim proceeds to issue and is tried, the proceedings in the original action being in the meantime stayed. But where the attachment is clearly not sustainable, a bill of proof is not necessary (1); but where there is the least doubt, or any apprehension of collusion between the plaintiff and the garnishee this course of proceeding is expedient.

Remedies at law.
Foreign attachment.



With respect to the forms and effect of the different remedies to enforce payment of a debt, or performance of a contract, it would be impossible here to enter into a nice discussion of the points of pleading. We will only consider a few leading rules and principles.—At a very early period of our history, appropriate forms of action were framed by the officers of the courts, and most of these are collected in *registrum brevium*, and were termed *brevia formata*. At common law also, when no form could be found in the register adapted to the nature of the plaintiff's case, yet he was at liberty to bring a special action on his own case, and writs were framed accordingly, which were termed *magistralia* (2); but as the officers of the court were found reluctant, in new cases, to frame the proper remedy, the legislature thought fit to enforce the common law, and it was enacted by statute Westminster, 13 Edw. 1. stat. 1. c. 24., that if it shall fortune in the chancery that in one case a writ is found, and in the like case, falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ, or adjourn the plaintiffs until the next parliament, and that the case be written in which they cannot agree; and that they shall refer such cases until the next parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice to the complainants. To this statute the great encouragement and frequency of actions on the case is attributed. It has,

Form of other Remedies.

(1) 1 Marsh. Rep. 233.

(2) 8 Co. 47. b. 48. a. 2 Bla. Rep. 1113. 3 Woodeson, 168.

however, been observed, that it by no means follows, that because in case unprovided for by the register, the statute of Westminster 2. directs an action on the case to be framed, that such action did not subsist at common law (1). When the prescribed form of action is to be found in the register, the proceedings should not materially vary from it (2), unless in those cases where another form of action has long been sanctioned by usage (3); for the courts have considered it of the greatest importance to observe the boundaries of the different actions, not only in respect of their being logically framed, and best adapted to the nature of each particular case, but also in order that causes may not be brought into court confusedly and unmethodically, and that the record may at once clearly ascertain the matter in dispute; a regulation which, since the different legislative provisions respecting costs, the right to which varies in different forms of action, has become of still greater importance.

The actions for the breaches of contract are *assumpsit*, *debt*, *covenant*, and sometimes *detinue*. *Assumpsit* is so called from the word *assumpsit*, which, when the pleadings were in Latin, was always inserted in the declaration as descriptive of the defendant's undertaking. It is the peculiar remedy for the breach of a contract where the damages are unliquidated, when such contract was not under seal. It lies, however, to recover money due on simple contract; but in no case can it be supported on a deed. The action of *debt* is so called, because it is in legal consideration for the recovery of a debt *eo nomine* and *in numero*, and the damages are in general awarded for the detention of the debt; yet, in most instances, they are merely nominal, and are not, as in *assumpsit* and *covenant*, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to (4). *Debt* is a more extensive remedy for the recovery of money than *assumpsit* or *covenant*, for it lies to recover money due upon legal

(1) 2 Bla. Rep. 1113.

(4) 1 Hen. Bla. 350. Cowp.

(2) Bac. Ab. Abatement.

588.

(3) 4 Co. 94. 3 Woodes. 169.

liabilities (1), or upon simple contracts, express or implied (2), whether verbal or written, and upon contracts under seal or upon record, and on statutes by a party grieved or by a common informer, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty (3); as on a contract to pay so much per load for wood, the quantity of which was not then ascertained; or on a *quantum meruit* for work, or to pay a proportion of the costs of a suit expected to be incurred (4), or to recover the treble value of tithes not set out according to the statute. But it is not sustainable when the demand is rather for unliquidated damages than for money (5), unless the performance of the contract were secured by a penalty, in which case debt may be supported for the penalty, and the real demand is to be ascertained according to the provisions of the 8 & 9 Will. 3. c. 11. The action of *covenant* is so called from its being the remedy for the breach of a covenant; it lies only where the contract is under seal, where the damages are unliquidated, and depend in amount on the opinion of the jury, in which case, we have seen, neither debt nor assumpsit can be supported. *Detinue*, as already observed, lies upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract, when the property therein is vested in the plaintiff. But unless the property be so vested, assumpsit or debt in the *detinet* is the only remedy for the non-delivery of the goods sold.

In cases where the plaintiff has an election of several remedies, much consideration and judgment is frequently required in the choice, and many cases occur in which, by the judicious choice of one in preference to another, a remedy may be perfected which would otherwise be futile. There are no less than ten leading points to be kept in view in the election of the several remedies for the same injury, besides several subordinate matters. It would be considered tedious to enumerate them all; we will only mention one as fully establishing the importance of a judicious choice. Thus, where money is due on a mortgage deed, if the plaintiff declare in covenant for the non-pay-

(1) Hob. 206.

(2) *Id.*

(3) Bull, N. P. 167.

(4) 3 Lev. 429.

(5) Lord Ray, 1040. 2 Saund.
52. b.

ment, he will not be entitled to bail in error, in case the defendant suffers judgment by default ; whereas by declaring a debt upon the covenant, the defendant, in a similar situation, must put in bail, or the writ or error will be a nullity ; and as bail in error are absolutely liable for the ultimate payment of the money, this may be of the utmost importance in the success of the suit.

CHAP. XV.

Of Arbitrations and Awards. (1)

ANOTHER mode of obtaining redress for an infringement of a contract, is by referring the matter in dispute to the decision of a third person, who pronounces his award or judgment thereon. Sometimes it is referred to two or more persons; and if they do not agree, it is usual to add, that another person be called in as umpire, to whose sole judgment it is then referred. By the award the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties, or the judgment of a court of justice (2); and even with respect to the title to land, an award is conclusive evidence against the parties and all representing them (3). This mode of settling a dispute is now become very frequent in practice. In adjusting long and intricate accounts, or questions respecting several breaches of covenant,—in settling differences between partners, principals and agents, and relations,—in cases not fit to be exposed to public discussion, or where all the witnesses cannot conveniently be produced at one time, a reference to arbitration is perhaps the best tribunal to which parties can appeal; and in such cases it is expedient to refer in the first instance, in order to save the costs of an action and trial, which will in all probability ultimately terminate in a reference; and a peculiar advantage attends this mode of obtaining redress, that the parties themselves, who are interested in the event of the award, may by the consent of the parties be examined in evidence. But where a questionable point of law may arise, or the matter is readily capable of investigation in a court of justice, or where the character of witnesses may render a cross-examination before a jury essential for eliciting the truth, the trial of an action is most desirable.

(1) Com. Dig. Arbitrament.
See Tidd. Prac. 7 ed. 851 & 877.
Caldwell on Arbitrations. Kyd on
Awards.

(2) 3 East Rep. 15. Brownl. 55.
1 Freem. 410. 3 Bla. Com. 16.
(3) 3 East Rep. 15.

Of the submission. (1)

The act by which the parties bind themselves to refer any matter in dispute between them to some third person is denominated the *submission*. This submission may be simply by the act of the parties, or through the medium of a court of law or equity; and in some cases the legislature compels disputes to be referred to arbitration (2). In the former case the submission may be by parol, by written agreement not under seal, by indenture (3) with mutual covenants to abide by the decision of the arbitrators, by deed poll or by bond (4) reciprocally given by the parties in a certain penalty, on condition to be void on performance of the award; but such bonds may be given to a third person, or even to the arbitrator himself, and they may also be given by any other persons properly authorized on behalf of the parties, who will in such case incur the penalties of the bonds if the parties do not perform the award (5). It need not appear on the face of each bond how many parties there are to the submission. (6) If the submission be improperly obtained it will not be binding. (7)

Previous to the reign of Charles the second, awards were generally made on submissions by the acts of the parties only; but mercantile transactions becoming frequently the subject of discussion in our courts, the practice became general, about the latter end of the reign of the above king, of referring matters to arbitration by consent of the parties under a rule of court, or judge's order before the trial, or by order of *nisi prius* at the trial; the utility of which was so generally experienced, that this practice became a legislative provision, and the privilege of it extended to submissions where no action had been brought (8). By the 9 & 10 Will. 3. c. 15., all merchants and traders, and others, desirous to end by arbitration any controversy, suit, or

(1) Com. Dig. Arbitrament D.

(2) As to commissioners under enclosure acts. By the 39 & 40 G. 3. c. 106. for preventing unlawful combinations of workmen, magistrates are empowered to act as arbitrators in adjusting difference relative to wages, &c.; so under the friendly society acts.

(3) 2 Mod. 73.

(4) As to the stamp, see 2 Chitty 40.

(5) See Montefiore, *tit. Award*.

36 Hen. 6. 8. 22 E. 4. 25 a. Comb. 100. Machel's Case, King's Rep. C. B.; but it should seem by the last case that a submission by A. for B. cannot be made a rule of court.

(6) Cro. Car. 433.

(7) See ante 2 Chitty's Reps. 39. As to the method of taking advantage of a defect in a submission, see *id.* & 3 Taunt. 378. 432. 11 East 188. 4 Camp. 163, 4.

(8) See 2 Burr. 701.

quarrel, for which there is no other remedy but by personal action or suit in equity, may agree, that their *submission* of their suit to the award or umpirage of any person or persons, should be made a rule of any of his majesty's courts of record, and to insert such their agreement in their submission, or the condition of the bond or promise whereby they oblige themselves respectively; which agreement being so made and inserted, may on producing affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and on reading and filing the said affidavit in court, be entered of record in such court, and a rule shall be thereupon made by the said court that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing shall be subject to all the penalties of contemning a rule of court. This statute does not alter the common law. (1)

Under this statute the courts have no authority to make a *parol* submission to an award a rule of court (2), though a parol award in pursuance of a written submission may be enforced (3). It should appear upon the instrument by which the submission is made, that the parties consent to make the submission a rule of court, though such consent need not be expressly stated on the face of the submission (4). But the courts have jurisdiction under this statute, though the submission bond were to make the award instead of the submission a rule of court (5). In order to make the submission a rule of court, there must be an affidavit of the agreement to refer; and in case of unwillingness on the part of the witness to make such affidavit, the court will compel him to do so (6). It is not necessary that the submission should be made a rule of court before the arbitrators commence their investigation of the dispute; this may be done even after the award has been made (7). A submission may be made a rule of court in vacation (8), and

(1) See 2 Ves. jun. 453.

& P. 444. 8 T. R. 139.

(2) 7 T. R. 1.

(6) 1 Stra. J. 10 Mod. 332.

(3) Barnes, 54.

S. C. Barnes, 58.

(4) Lord Raym. 674. Barnes, 55.

(7) 6 Ves. 10. 5 Maddox, 74.

(8) 5 B. & A. 217.

(5) 3 East 503.; and see 2 Bos.

an order of *nisi prius* may be made a rule of court after notice of revocation of the arbitrators authority (1); and a judge's order referring to arbitration is not revoked by a revocation of the submission (2); and where a cause was referred by order of *nisi prius*, and the plaintiff became bankrupt after the reference, but before the making of the award, it was held to be no revocation of the submission (3). The submission needs not be made a rule of the same court in which the action was brought, unless there be an agreement to that effect (4). And a general reference to arbitration by parties in a suit depending in chancery may be made a rule of a court of law (5); and it seems, that under the statute of William, a submission to a reference may be made an order of a court of equity (6); and the court of chancery will compel, by attachment, the performance of an award made in pursuance of such a submission. (7)

Parties to the submission. (8)

Every person capable of making a disposition of his property, or a release of his right, may make a submission to an award (8); persons therefore who are under either a natural or civil incapacity of contracting, are alone excluded. A married woman therefore cannot be a party to a submission, but the husband may submit for himself and his wife, and thereby bind himself (9); and a guardian may submit for an infant, and bind himself, that he shall perform the award (10). There are cases, however, in which the wife must be a party to the submission. A *feme covert* or sole trader by the custom of London, may submit a matter to arbitration (11), and she may do so if the husband be civilly dead (12). Executors and administrators may make any controversies arising out of their respective situations the subject of a reference (13). If an executor or administrator submit a matter in dispute between himself and another, in right of his testator or intestate, this will be at his own peril, for if the arbitrator do not give him the same measure of justice as he is entitled to by law, he must account for the

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| (1) 1 Chitty's Rep. 200. | (8) Com. Dig. Arbitrament, D. 2. |
| (2) 2 Chitty, 202, 3. | as to the parties. |
| (3) 4 B. & A. 250. | (9) Sti. 351. 5 Ves. 846. |
| (4) 1 Anst. 273. | (10) Comb. 318. Latch. 207. |
| (5) 14 Ves. 265. | (11) 2 B. & P. 93. |
| (6) 3 P. Wms. 362. Com. Dig. | (12) 2 Vern. 104. 1 T. R. 5. |
| Chancery, 2 K. 2.; sed vide Fidd. | Co. Litt. 133. a. |
| 7 ed. 853. | (13) Stra. 1144. 1 T. R. 691. |
| (7) 2 Vern. 444. | 5 T. R. 6. |

deficiency to the persons interested in the effects (1). Trustees may submit matters to arbitration (2), and assignees of a bankrupt may submit to arbitration any matters in dispute, provided they pursue the directions of the 5 Geo. 2. c. 30. s. 3. (3) An authorized agent may submit matters to arbitration, and bind his principal (4). So one of many partners may submit for the rest. (5)

Parties to submission.

Any dispute concerning personal property, even a debt on a specialty, though certain, may be submitted to arbitration (6); and all breaches of contract therefore come within this rule (7). It has been said, that as the intent of the parties in submitting to an award is to obtain an expeditious and amicable adjustment of something which was in its nature uncertain, no award can be had on a bond for payment of any sum certain, nor of a covenant to pay a certain sum of money, nor damages recovered by a judgment, because the demand is in all these cases ascertained or liquidated (8); but this rule is too general, because questions may arise respecting the legality of such securities, or the manner in which they were obtained, or whether they have been paid or satisfied (9); and when certain or liquidated demands are coupled with others which are uncertain, those which are certain may be submitted, and this even in the case of a verdict and judgment (10). In general, however, where the party recovering could in an action recover only uncertain damages, the subject of complaint may be referred to arbitration, as any demand not ascertained by the agreement or contract of the parties, although the claimant demands a sum certain, such as a claim of £5 for the different expences in the service of either party. So also an action of account may be taken, for till the account be taken the sum remains uncertain. A mere ques-

Subject-matter of reference.

(1) 7 T. R. 453. 691. 5 T. R. 6.

(2) 3 Esp. 101.; see 2 Chitty's Repts. 40.

(3) See 1 Atk. 90.

(4) 3 Taunt. 486. 378. 4 Campb. 163. 1 M. & S. 719. 1 Wils. 28. 58. Salk. 70. Lord Ray. 246. Holt, 78. 12 Mod. 129. Carth. 412. Skin. 679. 3 Wils. 374. Dyer, 217. b. 8 T. R. 571. 1 Ch. Ca. 86.

(5) 2 Mod. 228. Com. Dig. Arbitrament, D. 2.

(6) Com. Dig. Arbitrament, D.

3, 4. 9 Coke, 78. 7 Taunt. 422. 1 Moore, 120. S. C.

(7) 1 Keb. 848. 3 Rep. in Chan. 42.

(8) Roll. Ab. tit. Arbitration, R. 1. G. B. 8. 1 Keb. 937. 1 Lev. 292. Gouldsb. 21.

(9) Com. Dig. Arbitrament, D. 3. 1 Lev. 292.

(10) Roll. Ab. tit. Arb. B. 8. 1 Keb. 937.

Subject-matter of reference. tion of law may be referred to arbitration (1), as may the construction which shall be put upon any particular instrument. (2)

Form of submission. We have already in some degree considered what may be the form of the submission (3). In all cases where the demand arises upon a deed, the submission ought also to be by deed.

If the parties intend to refer all disputes, the terms of the reference should be, "of all matters in difference between the parties;" when the reference is only intended to be of the matter in the particular cause, it should be, "of all matters in difference in the cause (4)." A time should in all cases be mentioned within which the arbitrators or umpire are to pronounce the award, but if no time be limited for this purpose in the submission, it is understood that the award shall be made within a reasonable time, and if in such case the arbitrators refuse to make their award, upon request of the party, a subsequent revocation of the authority will be no breach of the submission (5). In general, a certain day is fixed before or on which the award shall be made, but it not unfrequently happens that more time is necessary for the due investigation of the matter than was originally supposed; it is usual therefore to vest in the arbitrators a discretionary power of enlarging the time within which the award shall be made, but it should be stipulated, that this enlargement of the arbitrators shall be made a rule of court. In entering into an agreement for a reference, or a rule of reference at nisi prius, with a verdict for the plaintiff, it is prudent to provide by a special stipulation, that the reference shall not be defeated by the death of one of the parties before award made (6); and in the latter case, a verdict should be taken, for otherwise the bail for the defendant would be discharged from liability. In some cases the courts will amend an order of reference. (7)

Construction and effect of submission. (8)

The words of a submission must be so understood as to give a reasonable construction of their meaning, according to the

(1) 9 Ves. 367.

(2) 10 Mod. 59.

(3) Ante, 638. Com. Dig. Arbitrament, D. and id. D. 4. Tidd, 7 ed. 854.

(4) 3 T. R. 626.

(5) 2 Keb. 10. 20. 3 M. & S. 145.

(6) 7 Taunt. 571. 2 B. & A. 394.

(7) 5 B. Moore, 167.

(8) Com. Dig. Arbitrament, B. 4.

intention of the parties; and where there is any repugnancy in the words of any part of the submission, such repugnant words will be rejected, and the former shall stand (1). A submission to arbitration by rule of court, of all matters in difference *between the parties in the cause*, is not confined to the subject-matter in the particular action then depending, but will extend to cross demands between the parties (2); but a reference of all matters in difference *in the cause between the parties* is confined solely to matters in dispute in that particular action (3). Where "all matters in difference" are submitted, these words are construed to mean all matters which subsist jointly or severally between the parties (4). But in a case where all controversies were submitted, it was determined, that an indictment for a battery was not a controversy between the parties within the meaning of the submission (5). If the submission be "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims and demands," the arbitrators may award a release of all bonds, specialties, judgments, executions, and extents (6). Where the submission is of all debts, trespasses, and injuries, an award to release all actions, debts, duties, and demands, does not exceed the submission, the word "injuries" comprehending the demands (7). A party by agreeing to refer the quantum of a demand, does not thereby waive any objection to its illegality when sued for the sum awarded (8); and the agreeing to refer the quantum of damages to arbitration, after a question of law has been reserved by the judge at the trial, does not waive an objection to the defendant's liability in the action after the arbitrator has made his award. (9)

Construction
and effect of
submission.

It may be material to observe, that the submission does not in effect impliedly stay the proceedings in a suit already commenced (10); but when a reference is pending, and it is agreed that it shall operate as a stay of proceedings, then it will be otherwise (11). No agreement to refer all disputes to arbitration

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| (1) 1 Saund. 65. Cro. Car. 226. | (5) Freem. 204. Vid. 7 Taunt. |
| 2 Keb. 204. S.C. Pop. 15. 39 H. 6. | 422. 1 Moore, 120. S. C. |
| 9. 6. 11 a. Caldwell, 25. Rol. Ab. | (6) Montefiore, tit. Award. |
| P. 4. 4 Taunt. 254. 2 Ves. jun. | (7) Bulst. 312. |
| 543. | (8) 1 Esp. Rep. 167. |
| (2) 2 T. R. 645. 3 T. R. 626. | (9) 2 Dowling & R. 461. |
| 2 Saund. 64. (7). 3. | (10) Lord Raym. 789. 1 Mod. |
| (3) 2 T. R. 643. Tidd, 7 ed. | 24. 8 T. R. 139. |
| 854. 3 T. R. 626. | (11) Tidd's Prac. 7 ed. 545, |
| (4) Com. Rep. 546. | 855; sed vid. 2 Moore, 36. |

Construction
and effect of
submission.

can oust the courts of law or equity of their jurisdiction (1). Where a verdict was found for the plaintiff at nisi prius, for the damages in the declaration, subject to the award of a gentleman at the bar, and the arbitrator declined proceeding in the reference, it was held that the plaintiff was entitled to judgment and execution forthwith, unless the defendant consented to refer the damages to another gentleman (2). Some contradiction appears in the cases, as to the operation of a covenant to refer disputes to arbitration. The court of chancery will certainly not decree the specific performance of such an agreement (3). And upon one occasion where a party had so covenanted, the court of common pleas seemed to be of opinion, that no action could be maintained for refusing to nominate an arbitrator. (4)

Revocation of
submission. (5)

Every species of authority being a delegated power, although by express words made irrevocable, is nevertheless in general revocable. A submission to arbitration may be revoked by the act of God, by operation of law, or by the act of the parties.

By death.

The death of either of the parties to the submission, before the award is delivered, in general vacates the submission (6), unless there be a stipulation therein to the contrary (7). And if after reference by bond one of several of the obligees dies before award made, the arbitrators cannot award payment to the survivors and the executors of the deceased, and that they shall release obligors (8). Death is a revocation of authority even in equity (9). Where a cause is referred by order of nisi prius to arbitration, the death of one of the parties, at any time before award made, is a revocation of the arbitrators' authority, and the court will set aside an award made after his death (10). And where a verdict was taken for the plaintiff, subject to the award of an arbitrator, such reference being authorized by an order of nisi prius, and the defendant died after the verdict, but before the award, and

(1) 1 Wils. 129. 8 T. R. 139.
6 Ves. 818. 14 Ves. 270. 15 Ves.
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(2) 2 Dowling & R. Rep. 158.
1 id. 409.

(3) 19 Ves. 431. 6 Ves. 815.
2 Bos. & P. 135.

(4) 2 B. & R. 13; sed vid. 2 Ves.
jun. 129.

(5) See in general, Com. Dig.
Arbitrament, D. 5. Tidd, 7 ed.
855.

(6) 2 Bar. & Ald. 394.; and see
1 Marsh. 366. 17 Ves. 341. Tidd,
7 ed. 855.

(7) Ante, 642.

(8) 2 Chitty's Reps. 432.

(9) 17 Ves. 241.

(10) 1 Chitty's Reps. 187.

the arbitrator after such death made the award, ordering a verdict to be entered for the defendant; it was held, that such award was bad, as the death of the defendant was a revocation of the arbitrator's authority (1). Therefore, as before observed, the parties should always insert a clause in a bond or agreement of arbitration, or in the order of *nisi prius*, to obviate this effect arising from the death of either party. (2)

Revocation of
submission.

If a feme sole submit to arbitration, and marry before the award is delivered, such marriage is in effect a revocation (3), without notice to the arbitrators (4); and an award afterwards made will be invalid, though the marriage will constitute a breach of the condition to abide by the award, and subject the husband and wife to an action on the bond (5). And if an unmarried woman and another person on the one part submit to arbitration, her subsequent marriage is a revocation as to the other party as well as to herself (6). It should seem that the *bankruptcy* of one of the parties is no revocation of the arbitrators' authority (7); and where a cause was referred by order of *nisi prius*, and the plaintiff became bankrupt after the reference, but before the making of the award, it was held to be no revocation of the submission (8). If the arbitrators or one of them die, this will defeat the reference, unless there be a stipulation in the submission to the contrary. And where a plaintiff obtained a verdict, subject to a reference, and the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead; and one of them afterwards objected to such substitution, the court of common pleas refused to interfere, as the death of the arbitrator had the effect of opening the cause, and as execution could not be sued out on the verdict on account of such death (9). If the arbitrators neglect to make their award within the time limited, or they disagree, or refuse to act or intermeddle any further, or they appoint an arbitrator to act

By operation of
law.

(1) 1 Moore, 287. 7 Taunt. 571. S. C. 1 Chitty's Repts. 187. n. a.

(2) 2 B. & A. 394. Ante, 642.

(3) 2 Keb. 865. W. Jones, 388. Tidd, 7 ed. 855. 3 Keb. 9. Com. Dig. tit. Arbit. D. 5. 5 East, 266.

(4) Roll. Arb. 331. Vin. Ab. Authority, 1. 4.

(5) 5 East, 266.

(6) Jones, 388. Roll Arb. 331. Vin. Ab. Authority, 1. 4.

(7) 2 Chitty's Repts. 43. 4 B. & A. 250.; see also 15 East, 622. 8 T. R. 140. 6 Taunt. 123. Holt, 172. 1 Crompt. 270.

(8) 4 B. & A. 250. See 1 Crompt. 270.

(9) 4 Moore, 3.

Revocation of submission.

for them, the submission will be revoked (1), and a court of equity will not compel arbitrators to proceed. (2)

By the act of the parties.

The submission to arbitration under a deed or agreement may be revoked by the express act of the parties at any time before the award is made (3); but where there are several on the same side, one of them cannot revoke, leaving the matter as it affects the others still subject to the arbitrators' decision. A judge's order referring to arbitration is not revoked by a revocation of the submission (4); and an order of *nisi prius* may be made a rule of court after notice of revocation of the arbitrators' authority (5); but in these cases the arbitrator's authority is revoked (6). The revocation must be by the persons really parties to the submission; for where A. was bound for B., it was considered not regular that the revocation should be by A. (7)

The nature of the revocation must follow the nature of the submission: thus, if the latter be merely by parol, the revocation may be by parol also (8). The words, "I discharge you from proceeding any further," addressed to the arbitrators, will be sufficient. If the submission be by deed, the revocation must also be by deed (9). Where a party had judgment in an ejectment, and then submitted the matter to arbitration, but before any award delivered sued out execution, this was considered as a virtual revocation (10). In order to render a revocation by the act of the parties effectual, notice must be given to the arbitrators. (11)

Effect of revocation.

Any award made after a revocation of the arbitrators' authority is not binding; and an award made under a judge's order, after revocation, where the revocation was made before the

(1) 1 Roll. Ab. 261. 1 Sid. 428.
2 Saund. 129. 1 Lev. 174. 285.
302. 2 Lev. 263. 2 Vent. 113.
1 Salk. 70, 71, 72. Tidd, 7 ed.
855. 2 Keb. 10. 20. 3 M. & S.
145.

(2) 1 Wils. Ch. Rep. 31.

(3) 28 H. 6. 6. 1 Brownl. 62.
Tidd, 7 ed. 855. Cald. 30. 8
Co. 82. 7 East, 708. 11 East,
367. 3 M. & S. 145. 5 Taunt.
452. 1 Bingh. 87.

(4) 2 Chitty's Reps. 202, 3.

(5) Id. 200.

(6) 1 Bingh. 87.

(7) 2 Keb. 79.

(8) 2 Keb. 64.

(9) 8 Co. 72. Brownl. 62.

(10) T. Jones, 134.

(11) Roll. Arb. 331. Vin. Ab.
Authority, 1. 3. 2 Brownl. 29.
5 Bar. & Ald. 507. How to plead
revocation, and notice thereof.

judge's order was made a rule of court, was set aside (1). By this countermand or revocation of the power of the arbitrator, the bond of submission or covenant to perform the award is forfeited and broken, and the obligee and covenantee shall take the benefit thereof (2). If a party has covenanted to perform an award, and an award be made, he cannot, by revoking his authority, relieve himself from an action of covenant; nor will the court in such case set aside the award, because it would deprive the other party of his action (3). There have been instances where, upon a submission by rule of court, an attachment has issued against a party who has committed an act rendering it impossible for the arbitrator to proceed, or has otherwise revoked the submission (4); and it would be a contempt to revoke the submission after it has been once made a rule of court (5). The modern practice however seems inclined to leave the party to his action, if he has any thing, to proceed by it in preference to proceeding against the other who has revoked for the contempt. (6)

Revocation of
submission.

No subsequent assent to the revocation by the party, nor consent by the party revoking, that the arbitrator shall proceed, will be effectual to prevent the operation of the original revocation (7); and after either party has once formally revoked, the submission cannot be made a rule of court (8), but an order of nisi prius may. (9)

It is in the discretion of the parties between whom a difference subsists, to delegate the adjustment of that difference to any persons whom they may think proper to elect; and it is for the parties alone to judge of the fitness and competency of those

Of the arbitra-
tors and their
appointment.

(1) 1 Bingh. Rep. 87.

(2) 8 Co. 82. T. Jones, 134. 5 Taunt. 453. 1 Dowling & R.'s Reps. 106. 5 East, 266. vide 4 Coke, 61. (b.)

(3) 5 Bar. & Ald. 507. 2 Chitty's Reps. 316. 5 Taunt. 453. 1 Dowl. & R. 106. 5 East, 266.

(4) Crompt. Prac. 262.; sed. vid. Sid. 452. Salk. 73. 7 Mod. 8. Ch. Ca. 185.

(5) 1 Stra. 593. 7 East, 608. 5 Taunt. 452. 2 Moore, 30. See 2 B. & A. 395. 1 Chitty's Reps. 204. S. C. 1 Jac. & W. 511. 1 Bingh. Rep. 87.

(6) 7 East, 607. Cald. 34. (7) Roll. Ab. 331. Vin. Ab. Authority. 3 Keb. 745. 7 East, R. 607. 5 Taunt. 452. 2 Keb. 865. 3 Kemb. 9. S. C. 4 Moore, 3.

(8) 5 Taunt. 452.

(9) 1 Chitty's Rep. 200.

Of the arbitrator
and his appoint-
ment.

whom they invest with such authority (1). Of course a party having important interests at stake will rarely be so imprudent as to trust himself to the discretion of another, in whom either want of capacity, ability, or defect of character is notorious, though if such a senseless submission were entered into it would be valid (2). The circumstance of a man being himself interested, being a party, or closely connected with the opposite party (3), will in general prevent him from being chosen to act as an arbitrator; but if a person so situated should, either from inattention or from the high opinion entertained of his integrity and judgment, be appointed an arbitrator, the party will not be allowed afterwards to impeach the award on the ground of the improper appointment (3). It should be clear, however, that the party making such appointment was under no mistake; for if the interest of the arbitrator in the subject of the reference, or his relationship to the opposite party being unknown at the time of nomination, arose or were discovered subsequently, there can be little doubt but that the courts would entertain an application for relief (4). In general an objection to the appointment of an arbitrator will be waived by attending him. (5)

Of the umpire
and his appoint-
ment.

The same rules which affect the appointment of arbitrators regulate also on the appointment of an umpire by the parties, and when the power of this appointment is left to the arbitrators, they should exercise in such appointment their best understanding and judgment. Where an umpire has been once properly appointed by the arbitrators, the appointment will not be afterwards affected by the dissent of the parties (6). Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage (7). They may elect one immediately previous to entering upon the examination of the matter referred to them (8), and this is generally the fairest way of pro-

(1) Rol. Arb. A. 2. Com. Dig. S. C. Comb. 218. Hard. 43. Arbit. B. Cald. 37. According Cald. 37.

to Montefiori's Dict. tit. Award, (4) 2 Vern. 251. Cald. 38.

an infant or married woman cannot be an arbitrator; but see Co. 344. (5) 1 Jac. & W. 511. 8 East,

Lit. (6) 11 East, 367.

(2) Cald. 37. (7) 15 East, 556.

(3) Rol. Arb. A. 2. 4 Mod. 226. (8) 2 T. R. 644.

ceeding (1). If the bond be, that if the arbitrators do make their award by a day named, then to abide the award of an umpire to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire commences when the time for making their award expires (2). It seems that there should be a formal written appointment of the umpire; the most usual way is by an indorsement made by the arbitrators upon the instrument of submission (3). This appointment need not be stamped (4). Where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three or any two of them, and each of the arbitrators proposed to the other a third, who was admitted to be a fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot; the court held that this was within their authority, and that an award made by such third arbitrator in conjunction with the one by whom he had been originally proposed, could not be impeached on that account. (5) So where the arbitrators had executed their authority by an effectual appointment of an umpire, who accepted and acted upon the authority so conferred on him, the court held his umpirage to be binding, notwithstanding one of the parties afterwards dissented from such appointment (6). But where the parties named two arbitrators, who were to choose an umpire, and each arbitrator named a person to whom the other objected, and they afterwards agreed to decide by lot which should name the umpire, and thereupon the party who won named the person to whom the other had previously objected, the court held that the award made by such umpire was bad (7). If the arbitrators nominate an umpire, who refuses to act, they may nominate another (8).

Of the umpire
and his appoint-
ment.

If the arbitrators and umpire make several awards, each within the limited time, the award of the former must prevail; if the arbitrators make no award, the award of the umpire is good (9). If on the other hand the arbitrators neglect to make

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| (1) 2 Mod. 169. 2 Saund. 133. | (8) 3 Lev. 263. 5 Mod. 457. |
| (7.) | 2 Vent. 113. S. C. Sayer, 221. |
| (2) 4 Taunt 232. | Caldwell, 44. acc.; sed vide 1 Salk. |
| (3) 4 Camp. 17. | 70. Lord Raym. 222. 12 Mod. |
| (4) 4 Taunt. 704. | 120. S. C. |
| (5) 16 East 51. | (9) Sir J. Jones, 167. 2 Show. |
| (6) 11 East 367. | 164. S. C. |
| (7) 2 Barn. & Ald. 213. | |

their award within the limited time, and the umpire make it within the time limited to him for that purpose, his award will be good (1). The arbitrators by appointing an umpire, do not divest themselves of the power of proceeding in the reference (2).

Proceedings by
arbitrators and
umpire.

As soon as the arbitrator or umpire are chosen, a time and place should be appointed for examining into the matter, and notice of such appointment should be given to the parties or their attorneys. Want of notice of the meeting is a ground for setting aside an award (3). The parties are bound to attend the arbitrators according to the appointment, either in person or by attorney, with their witnesses and documents. If a party neglects or refuses to attend, the arbitrator may proceed *ex parte* (4). When a suit is referred to arbitration, it is usual to obtain a rule of court for the party to attend the arbitrator (5). Where one party having ineffectually attempted to revoke his submission, refused to attend, it was decided that the arbitrator might proceed *ex parte* without giving him notice. (6)

The arbitrators may, if they think proper, examine the parties themselves, and call for any other information. An arbitrator is bound to examine witnesses and hear the parties statements *pro et con*, if required so to do, unless, indeed, the parties consent that he need not do so (7); and where an arbitrator having by mutual agreement of the parties closed his examination, refused the application of the defendant's attorney for another hearing, and made his award, the court would not set it aside, on the affidavit of the defendant's attorney, that he was in possession of evidence which would repel that on which the award was founded (8). But all the witnesses of the party against whom an award is made should regularly be examined, and in his presence if he require it, or it will be a ground for setting aside the award (9). If, upon a reference, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is by moving to set aside the rule of reference, but he cannot impeach the award (10).

(1) 3 M. & S 559.

(2) 2 T. R. 644. 15 East, 556.
Say, 221.

(3) Salk. 71. Cald. 45. 2 Chit.
Rep. 44. 4 Moore, 118.

(4) 9 Mod. 63. 9 Ves. 67. 12
Ves. 412.

(5) Kyd on Awards, 101.

(6) 1 Jac. & W. 512.

(7) 18 Ves. 449.

(8) 1 Marsh. 404.

(9) 4 Price, 232.

(10) 3 Taunt. 378. or to amend
the reference, 5 Moore, 167.

If the submission be by rule of reference at *nisi prius*, the witnesses should be sworn at the bar of the court, or afterwards, if then omitted, before a judge. (1) Whilst attending an arbitration, the parties, together with their witnesses, are protected from arrest on civil process. (2)

Proceedings by arbitrators and umpire.

If the arbitrators disagree, they may, though no umpire be named, call in the aid of a third person's advice (3). If an umpire has been mentioned by name in the submission, they then refer the dispute to him. If no umpire has been expressly named, they cannot decide by lot which shall name one (4). The umpire may proceed upon the report of the arbitrators, incorporating his own opinion with that of the arbitrators upon the points agreed, so as to constitute a final determination, and an umpire is not in general compelled to re-examine witnesses, unless requested (5). The arbitrators may join with the umpire in making the award (6).

The arbitrator or umpire must strictly pursue the authority given to him. This authority must necessarily depend on the terms of the submission, which we have before considered (7). It is the duty of an arbitrator to exert the utmost of his ability and power for the mutual benefit of both parties, and he may, if his own abilities fail, call in aid the judgment of a stranger (8). In general the safest course is to award according to law; and where a cause only is referred, the pleadings and the law should be observed, and if the arbitrator be doubtful how he should determine, he should state the facts specially in his award, so that the law may be decided by the court (9). But if the arbitrator chuse to put the law out of the question, and award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so (10); and though an arbitrator on a mixed question of law

Of the duties and powers of the arbitrator or umpire.

(1) Tidd's Prac. 7 ed. 857.

(2) 3 Ves. j. 350. 3 East, 89. 3 B. & A. 252. 1 Chitty Rep. 679.; sed. vide 1 Chit. Rep. 682.

(3) Emery v. Ware, M.T. 1801. Mont. tit. Award.

(4) 2 Vern. 485. 16 East, 51. 2 B. & A. 218.

(5) 4 T.R. 589. 2 Barnes, 317. 1 B. & P. 91. 175.

(6) Burr. 1474. 1 Bla. Rep. 463. S.C. 4 Taunt. 432. Caldwell, 42.

(7) Ante. 638. 642, 643.

(8) Emery v. Ware, M.T. 1801. Montefiore, tit. Award.

(9) 2 Bos. & Pul. 371,

(10) 1 Taunt. 48., & see 2 T.R. 645. 15 East, 209. 2 Marshall's Rep. 579.

Duties and powers of arbitrators and umpires.

and fact, has allowed transactions apparently illegal, as premiums of insurance on a voyage to an hostile port, the court will not set aside the award (1); and an arbitrator is not bound by a rule of practice adopted by courts of law for general convenience. Therefore, where on a reference of a chancery suit, and all matters in difference between the parties, the arbitrator allowed interest, which would not have been allowed by a court of law or equity, the court refused to set aside the award on that ground (2). But where a verdict has been taken for a certain sum, subject to the award of an arbitrator, he cannot award a greater sum than that for which the verdict was taken; and if he do, no *assumpsit* by implication will arise to pay even the extent of the verdict (3). It seems, however, that under a reference of all matters in difference, the arbitrator will not be confined to the amount of the damages for which the verdict was taken (4). Where it was stipulated, that in case of the breach of an agreement, the sum of £100 should be paid as a stipulated debt, binding on each party as to the amount, and an action for damages generally for the breach of this agreement was referred to an arbitrator, who awarded only £10 damages, the court intimated that the award was correct, but that at all events, in order to entitle the party to come to set aside the award, it was necessary expressly to shew that this clause was pointed out to the arbitrator at the time, and that he was required to act upon it (5); and where an arbitrator has power to award what he shall think fit to be done by either of the parties respecting the matters in dispute, it is a question whether he might not direct them to consent to an application to the court for enlarging the damages given by the verdict (6). An arbitrator, to whom all actions and causes of action, and all matters in difference whatsoever, in two actions subsisting between the same parties, have been referred, is not compelled to take matters of an equitable nature into consideration, but an award made by him in reference to the two actions only is final (7). If partners refer all matters and differences between them to arbitration, the arbi-

(1) 6 Taunt. 254. 2 Marsh. 579.
S. C.; and see 3 Taunt. 426.
1 Stark. Ni. Pri. 209. 1 Moore,
187.

(2) 2 Barn. & Ald. 691.

(3) 5 East, 139. See 1 Taunt. 151.

(4) 1 M. & S. 675.

(5) 2 B. & A. 704.

(6) 1 Taunt. 151.

(7) 1 Moore, 703. 7 Taunt.
644.

trators have authority in this case to dissolve the partnership (1). If an arbitrator be appointed to arbitrate a certain measure contemplated between the parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved (2). It is competent to arbitrators to enquire whether a ransom, for which the plaintiff seeks to be repaid, were justified by extreme necessity within the statute 45 Geo. 3. c. 72. s. 16. (3) If arbitrators have power to examine the parties in the cause, they may waive the objection taken to the competency of a witness, that he has such an interest that he ought to have been made a party, and such witness may be examined by the arbitrators. (4)

Duties and powers of arbitrators and umpires.

When a cause is depending, the submission is either silent with regard to costs, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and the reason why, in references of this sort, a provision is frequently inserted that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to withhold costs from the party who is in the right. But that is to be considered as the restriction of a power which he would otherwise necessarily have, of allowing costs at his election (5). Upon a submission by bond, however, of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between attorney and client (6), though in such case he has power over the costs of the cause (7); and it has been decided that arbitrators cannot award the costs of the reference, unless power be expressly given to them for that purpose (8): so where all matters in difference are referred to arbitration, except the costs of the action, and no notice is taken of the costs of reference, the latter are not in the

Costs.

(1) 1 Bla. Rep. 475.

(6) 12 East, 165., but see For-

(2) 1 Taunt. 549. See 1 Moore, rest, 73. Semb. contra.

(7) 1 Barn. & Cres. 277.

(3) 3 Taunt. 461.

(8) Willes, 62. Forrest, 73.

(4) 2 Taunt. 324.

1 Barn. & Cres. 277. 2 Chitty's

(5) 2 T.R. 644, 645. Forrest, Rep. 157.

77., but see Willes, 62.

Duties and powers of arbitrators and umpires.

discretion of the arbitrator (1). If no directions be given respecting the costs of an award, they are to be paid by both parties equally. (2)

When the costs are directed to abide the event, that must be taken to mean the legal event (3). Where a cause is referred to arbitration, and the costs are to abide the event of the award, the defendant is entitled to them if it appear by the award that the plaintiff's demand was originally under forty shillings, and he might have recovered it in a court of conscience. (4) But where the arbitrator in such case awards something to be done which proves that the event in fact is in favour of the plaintiff, he is entitled to costs, although the arbitrator do not award a verdict to be entered for him (5). And an arbitrator, under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred; but the award is not to be set aside entirely on that account, but only that part which is incorrect. (6) If a cause be referred to arbitration under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff for a certain sum, as a security for what shall be awarded to be paid to him and costs, the arbitrator cannot award a sum to be paid to the plaintiff without costs, because by the terms of the order he was precluded from entering at all into the question concerning costs (7); and where by the rule of reference the costs are to abide the event of the award, that includes the costs of the reference as well as of the cause. (8)

When the costs are left to the discretion of the arbitrator, he may either award a gross sum to be paid for costs, or he may award that one of the parties shall pay to the other costs to

(1) 7 Taunt. 213. 2 Marsh. 161. 1 Marsh. 234, 235. Tidd's 524. S. C. 1 B. & C. 277. Prac. 862.

(2) 1 Taunt. 165.

(3) Tidd. 7 ed. 862.

(4) 3 T. R. 139. Butler v. Grubb, H. 23 Geo. 3. K. B. Watson v. Gibson, H. 33 Geo. 3. K. B. Harrison v. Slater, T. 44 Geo. 3. K. B., and see 13 East,

(5) 1 Smith R. 426., and see 1 Barn. & Ald. 670. 2 Chitty's Rep. 155.

(6) 1 Chitty's Rep. 526.

(7) Say, Costs, 177.

(8) 9 East, 436., but see Barnes, 123. Pr. Reg. 103. S. C. Semb. cont

be taxed by the master or prothonotaries, or he may award costs generally (1). If an arbitrator appointed under an order of *nisi prius* only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit (2). Neither will an award that one party shall pay to the other the costs by him sustained in the action, include the costs of the reference (3). An arbitrator cannot, it seems, without authority, charge a certain sum for his own expences (4). If he award an excessive sum to be paid to himself, the court of common pleas will refer it to the prothonotary to reduce it (5). In the absence, however, of an express contract, the arbitrator is entitled to a reasonable remuneration for his trouble (6); and where he directs the payment of the costs of the award generally, without fixing the amount of them, it is doubtful whether the award is bad in that respect for uncertainty, or whether the amount may not be taxed by the officer of the court (7). When the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a remanet. (8)

Duties and powers of arbitrators and umpires.

If the arbitrators cannot make their award within the time limited by the rule of court or order of *nisi prius*, a rule may be obtained by consent for enlarging it, or where the submission is by agreement without suit, the time may be enlarged by consent of the parties; and if an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once (10); where the parties by an indorsement in general terms on the bonds of submission to arbitration, agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, and amongst others, that the submission for such enlarged time shall be made a rule of court;

Of the enlargement of the time for making the award. (9)

- (1) Tidd, 7 ed. 863.
- (2) Barnes, 123. 1 H. B. 223.
- (3) 1 H. B. 223.
- (4) 8 East, 13., and see 4 Esp. Cas. N. P. 47., but see Gow. 7, 8. and case there cited.
- (5) 3 Taunt. 461. 5 Taunt. 342.
- (6) Gow. C. P. 7. 1 Taunt. 165. 5 Taunt. 461. 342., sed vide 8 East, 13. 4 Esp. Rep. 47.

- (7) 4 Taunt. 658.
- (8) 5 Burr. 2694. Say. Costs, 179. S. C. Sparrow v. Turton, T. 7 Geo. 3. C.P. Say. Costs, 178. 2d ed.; but see cases Pr. C.P. 138. Pr. Reg. 103. Barnes, 123. S. C. Doug. 427. 3 Durnf. & East, 507. 6 Durnf. & East, 71. 131. 144. 1 H. Bla. 639.
- (9) Tidd's Prac. 7 ed. 858.
- (10) 1 Taunt. 509. 4 Taunt. 658. S. P.

Of the enlargement of the time for making the award.

and consequently the party is liable to an attachment for non-performance of an award made within such enlarged time, under the statute 9 & 10 W. 3. c. 15. (1) And where a cause was referred under a judge's order, with a proviso that the arbitrator should make his award on or before a day certain, but if he should not be then prepared, that the time should be enlarged from time to time as he might require, and a judge of the court might think reasonable and just; the court of king's bench held that the time for making the award was duly enlarged by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order granting such further time was not obtained until a day subsequent (2). But where in a similar case the indorsement was dated on a day subsequent to the expiration of the time originally given for making the award, that court discharged a rule nisi for an attachment for non-performance of the award. (3)

Of the award itself. (4)

An award ought regularly to be in writing signed by the arbitrators, and the execution properly attested, and where the terms of the submission require the award to be under seal, it must be executed accordingly; an award, however, may be made verbally, unless it be provided otherwise in the submission. As the whole authority of the arbitrators is derived from the submission, the award should be in perfect unison with the terms of such submission; it must therefore not be extended to any matter which is not comprized within the terms of such submission. The concurrence of all the arbitrators is necessary in making the award, unless it be expressly provided in the submission that a less number than all may act; and where there is such a proviso, all must be present, unless those who do not attend were wilfully absent, and had proper and previous notice. And where a cause was referred to three persons, and they or any two of them were empowered to make an award, an award made by two of them was held good, the third having had notice of the meetings, &c. (5) And where a submission was to two, so as they made their award on or before a

(1) 5 East, 198. 8 Durnf. & East, 87. contra; and see 8 East, 13.

(2) 1 Maul. & Selw. 1

(3) Good v. Wilkes, II. 56 G. 3. K. B.

(4) What is a good award in general, Com Dig. Arbitrament. E.

(5) Willes, 215. Barne, 57. S.C.

day certain, but if they did not by the time aforesaid make their award, then to an umpire, provided he made his award on or before a subsequent day, and the arbitrators finally disagreed before their time expired, and declared they would not make any award, and did not make any, the court of king's bench held, that the umpirage might be made after the final disagreement of the arbitrators, before the time allowed them had expired (1). And in a case of a similar nature it was held, that the umpirage need not state that the arbitrators disagreed (2). The arbitrators or a stranger may join with the umpire in making an award (3), though the arbitrators be *functi officio*. Of the award itself.

An award which is required to be made in writing, &c. and ready to be delivered at such a time, is complete, if made in writing, and ready to be delivered by the arbitrator within the time, though not actually delivered, but the party should have notice of the award (4). An arbitrator or umpire, having once made his award, is *functus officio*; therefore, after an award made under the hand of an umpire, and ready for delivery pursuant to the terms of reference, of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void, but the award was held to be good for the original sum awarded, which was still legible, the same as if such alteration had been made by a mere stranger without the privity or consent of the party interested. (5)

If an award be to do any thing against law it will be void; so also, if the award be to do any thing which is morally or physically out of the power of the party, such as delivering up a deed not in his custody, or over which he has no controul, or where the party is to compel a stranger to do any act of which he can neither enforce the performance, either in law or equity, or to do any thing unreasonable which may subject him in so doing to an action from another person. What shall or shall not be deemed reasonable is however necessarily dependant on the terms of the award, and many difficult questions have arisen on this point. (6)

(1) 3 Maul. & Sel. 559.

(2) 5 M. & S. 193.

(3) Burr. 1474. 1 Bla. Rep. 463. S. C. 4 Taunt. 432.

(4) 4 East, 584. 6 East, 310.

(5) 6 East, 309. 3 Smith, R. 400. S. C.; and see 8 East. 54.

11 East, 369.

(6) Rol. Arb. B. 12. 2 Mod. 304.

General requisites (1)

The general requisites of an award are, that it be certain, mutual, and final (2). But certainty to a common intent is sufficient (3); and an award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, is sufficiently certain (4). An award which settles the costs on both sides is final (5); as is also an award that certain actions be discontinued, and each party pay his own costs, this being in effect an award of *stet processus* (6). And an arbitrator, to whom all actions and causes of action, and all matters in difference in two actions between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration, but an award made by him in reference to the two actions only is final (7). But notwithstanding the award be final as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred (8). An award however may be good in part, and bad in part, provided the latter be independent of and unconnected with the former. (9)

Construction, effect, and operation of awards.

Awards are to be construed as deeds according to the intention of the arbitrators; they should not be construed too strictly according to the letter, but liberally, according to the intent and meaning of the parties, and according to the power or authority delegated to the arbitrators. And in a question on the construction of an award, the court will endeavour to discover such a meaning as will make it certain and final, rather than a contrary construction, which would have the effect of defeating

(1) See Tidd, 860.

(2) See Bac. Ab. tit. Arbitrament. Kyd. on Awards, and 1 Saund. 327.

(3) 1 Burr. 274.; and see 7 Durnf. & East, 76.

(4) 6 Taunt. 254.

(5) Forrest, 73.

(6) 9 East, 497.

(7) 7 Taunt. 644. 1 Moore, 403. S. C.

(8) 4 Durnf. & East, 146. 4 Esp. Rep. 180.; but see Willes, 268. 7 Mod. 349. oct. ed. S. C. 1 Barn. & Ald. 106. East.

(9) Willes, 62. 66. 253. Forrest, 73. 8 East, 13. 445.; and see 2 Saund. 293 a. (1.) 12 Mod. 534. Cro. Jac. 584. 2 Clit. Repts. 594.

it (1). If the terms of an award be clear on the face of it, the court will not admit an affidavit of one of the arbitrators to explain their intention (2). Where upon the trial of an action of tort a verdict was found for the plaintiff, subject to a reference of all matters in difference, the defendant claimed before the arbitrator a sum of money due to him on the balance of an account which was admitted by the plaintiff to be due, the award, without stating that it was made *of and concerning the premises*, directed a verdict to be entered for the plaintiff with damages, it was held that this award was sufficient (3). All actions mentioned in the award shall be construed to mean all actions over which the arbitrators are by the terms of the submission empowered to decide. If there be any contradiction in the words of the award, so that one part cannot stand consistently with the other, the first part shall stand, and the latter be rejected, but if the latter be only an explanation of the former, both parts in such case shall stand (4); and where any words in an award are ambiguous, they shall be construed so as to give effect to the award. If an award be to give releases up to the time of making the award, this shall be construed in such manner as to support the award. It is questionable whether interest is claimable on a sum awarded. (5)

Construction
and effect of
awards.

In general those only who are actual parties to the submission shall be bound by the award; but although the operation of the award ought not to be extended to any person who is not a party to the submission, yet if the persons comprehended in the award were in contemplation of the submission, although not directly parties to it, such award will nevertheless be valid (6); and an award as to the title to land, binds all persons claiming under the parties to the reference (7). Where there are several claimants on one side, and they all agree to submit to arbitration, but some of them only enter into a bond to perform the award, such award shall bind the rest (8). And if a man authorize another on his behalf to refer a dispute, the award is bind-

(1) 1 Wils. Ch. Rep. 34.

(2) 3 Moore, 241.

(3) 1 B. & A. 106.

(4) 3 Bulst. 66, 7.

(5) Gow. C.N.P. 8. 3 Camp. 468.

(6) Roll. Ab. B. 18. Q. Whether an award directing the assign-

ment of an interest to A. B. will warrant an assignment to A. B., his executors, administrators, and assigns? 1 Stark, 13.

(7) 3 East, Rep.

(8) 24 Car. B. M. Montefiori, tit. Award; see Cro. Car. 434

Construction
and effect of
awards.

ing on the principal alone, unless the agent bind himself for the performance of the principal (1). If husband and wife submit to arbitration any thing in right of the wife, the wife shall be bound after the death of the husband; but a submission by an executor or an administrator is not of itself an admission of assets (2). So a reference by trustees does not necessarily make them personally liable (3), though they thereby admit they have assets. (4)

What is a per-
formance of
award.

The performance of an award need not in all cases be precise according to the very words of the award, it will be sufficient if it be substantially and effectively the same; and if the party in whose favour the award is made accept of a performance varying from that which was awarded, this will notwithstanding be sufficient (5). If an award be, that one party shall enter into a security for money, such as a note, bond, &c., giving such security shall be deemed a performance of the award; and on nonpayment, the person to whom such security is given can only proceed against the other on that security, and not on the submission or arbitration bond (6). Where the presence or concurrence of both parties is not necessary to the performance, each party ought to perform his part, even without waiting to be required by the other. Any number of years having elapsed since the making of the award will not in general constitute an objection to perform it by the parties, if called upon; nor can the statute of limitations be pleaded in bar to an award, if made under hand and seal. (7)

The remedy to
compel perform-
ance. (8)

The mode of *enforcing* an award by the party in whose favour it is made must vary according to the various forms of the submission. The remedy is by action, or by bill in equity for a specific performance; or where the submission is made a rule of court, by attachment (9); and if a verdict has been taken for the plaintiff's security, by entering up judgment thereon, and taking out execution. Upon a submission being made a rule of court, it was formerly holden that the party might proceed both by action

(1) 1 Wils. 28. 58.

(2) 1 T. R. 691. 7 T. R. 453.
5 T. R. 6.

(3) 5 Esp. 101.

(4) 2 Chitty's Reps. 40.

(5) 3 Bulst. 67.

(6) 2 Stra. 903. 1802.

(7) See post.

(8) See Tidd, 865. As to the
remedy in general, Com. Dig. Ar-
bitrament, I. 1.

(9) 1 Salk. 83.

and attachment at the same time (1); but a different doctrine has been since laid down (2); and accordingly, in a late case, the court of common pleas would not grant an attachment for non-performance of an award pending an action brought upon it, nor would allow the plaintiff to waive the action in order to apply for an attachment. (3)

The remedy to compel performance of award.

When the submission is by deed, with a penalty, and the award is made within the time limited, an action of debt lies upon the deed for the nonperformance of the award, and that whether the award be for the payment of money or the performance of a collateral act; but where in an arbitration bond a time was limited for the arbitrator to make his award, and such time was afterwards enlarged by mutual consent, it was holden that no action could be maintained on the bond to recover the penalty for not performing the award made after the time first limited (4). In such case the plaintiff should have proceeded by action of debt, or assumpsit, on the submission implied in the agreement to enlarge the time. An action of debt also lies upon a submission by deed without a penalty, or upon a submission in writing without deed or by parol, where the award is for the payment of money; but where it is for the performance of a collateral act, the plaintiff should proceed by action of covenant upon the deed; or if the submission be without deed, by action of assumpsit (5). And when matters in dispute are referred to arbitration without bond, and the arbitrators award a certain sum to be due, it may be recovered under a count on an *insimul computassent* (6). In all actions upon awards it must be unequivocally shewn that both the parties submitted, before the award itself can be properly introduced (7); the submission also must be so stated, as to correspond exactly with and support the award (8). The plaintiff is bound to shew that the award was made according to the terms of the submission; and where by the terms of the award performance on the part of the plaintiff is a condition precedent to that on the part of the defendant, the plaintiff must then shew that he has done every

(1) 1 Salk. 73.

(5) 2 Lord Raym. 1040.

(2) Andr. 299. Cas. temp. Hardw. 106.

(6) 1 Esp. Rep. 194.; but see *id.* 377.

(3) 1 Bos. & Pul. 81.

(7) 2 Stra. 923.

(4) 3 T. R. 529. in notes.

(8) Show. 61.

The remedy to
compel perform-
ance of award.

thing necessary to entitle him to call on the opposite party; but tender by the plaintiff, and refusal by the defendant, will be sufficient, unless the thing to be done by the plaintiff can be done with the concurrence of the other.

When an award is not for the payment of money, but an enforcement of any collateral act in specie, it may sometimes be enforced by a *bill in equity*, upon which the court will decree a specific performance; but a court of equity will not compel a defendant to discover a breach by which he may subject himself to the penalty of a submission bond (1). There is a distinction, however, to be observed between the cases where the reference was with the intervention of a court, and where it was entirely the act of the parties; in the latter there must be an acquiescence in the award by them, a part performance, or proof of some subsequent agreement to have it executed, in order to induce the court to interpose (2). In all cases a court of equity exercises a very wide discretion when called upon to enforce obedience to an award. Sometimes where a court of law would consider a party as bound to performance, a court of equity will refuse to compel it; sometimes where in a court of law an award could not be supported, equity will decree it to be performed (3). The specific performance of an award will be decreed in equity, it being an agreement on terms pointed out by a third person; and though equity will not specifically perform an unreasonable agreement, that doctrine does not apply to an agreement embodied in an award. (4)

Where the submission is by rule of court, originally or by order of *nisi prius*, or agreement which is afterwards made a rule of court, the party disobeying an award is not only liable to an action, but also to an attachment, as for a contempt (5). And where the original award was lost, the court, on a proper affidavit, granted an attachment upon a copy of it (6). But an attachment cannot be granted against a peer of the realm or member

(1) 3 P.Wms. 187. 1 Atk. 62.
6 Ves. 12. 14 Ves. 400. Vin. Arbit.
1. a. 4. 5. 1 Rep. in Chan. 76.

(2) 2 Rep. in Ch. 19. 1 Atk.
59. 3 P. Wms. 187. Ca. T. Finch.
18. 17 Ves. 241. See Cald. 168.

(3) Cald. 169.

(4) 1 Wils. Ch. Rep. 34.

(5) 1 Salk. 83.; and see 1
Saund. 327. c.

(6) 1 Stra. 526.

of the house of commons, for nonpayment of money, pursuant to an award (1). If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of court, and one party, in order to get the award out of the hands of the arbitrator, pay the whole it seems that he may have an attachment against the other party if he refuse to pay his moiety (2); but if upon the reference of an action in the common pleas the arbitrator award the costs of a nonsuit to be paid by one party, and a larger sum to be paid as a debt by the other, the party awarded to pay the smaller sum is entitled to a set off without motion; and if payment of the smaller sum be enforced by attachment, the court will set it aside. (3)

The remedy to compel performance of award.

The party having a remedy by action on the award, it is discretionary in the courts whether or not they will enforce it by attachment; and therefore, where there was a contrariety of evidence, they would not determine it upon affidavits, in a summary way (4). So where the defendant was a bankrupt, and incapable of paying the sum awarded, the court refused an attachment for nonpayment of it (5). And where a party was taken upon an attachment for not performing an award, after which he became bankrupt, and obtained his certificate, the court ordered him to be discharged; for this was a demand for which debt would lie, and the act says, he shall not be arrested, prosecuted, or impleaded for any debt due before the bankruptcy; it would therefore be hard to keep him in custody when the duty is discharged (6). A feme sole, having agreed to a reference, was awarded to deliver up two notes, and pay a sum of money: she married, and the husband refusing to pay it, it was doubted if the court would grant an attachment against both or either of them (7). And where an arbitrator awarded that A. should fulfil an agreement for the purchase of land of B., and should pay the purchase-money on B.'s conveying the land with a good title, the court of common pleas refused to grant an attachment

(1) 7 T.R. 171.448. Ante, 218.

(5) Anon, K. B. 1 Crompt. 270.

(2) 1 Bos. & Pul. 93. Stokes
v. Harris, M. 45 Geo. 3. K. B. 2
Smith, R. 12. S. C.

(6) 2 Stra. 1152; but see the
case *ex parte Sneaps, Co.* Bl. 7 ed.
211, 12. 9 East. 318.

(3) 4 Taunt. 632.

(7) Anon, 1 Crompt. 270.; and

(4) 1 Stra. 695. 1 Saund. 327. c. see 6 T. R. 161.

The remedy to
compel performance
of award.

against A. for non-performance, on an affidavit that B. had required A. to pay the money, assuring him of his readiness to convey him a good title, without further stating that B. had tendered a conveyance executed. (1)

The court of king's bench will not grant an attachment against an administrator for not performing a rule of court entered into by the intestate, and a submission to arbitration by an executor or administrator is not of itself holden to be an admission of assets, and therefore, if upon such a submission the arbitrator simply award a certain sum to be due to the testator or intestate's estates, without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can be attached for the nonpayment of it (2). The act of submitting to arbitration does not of itself make a trustee or administrator personally liable to costs (3); but a submission to arbitration by an executor or administrator is in general considered as a reference, not only of the cause of action, but also of the question whether or not he has assets, and therefore, if an arbitrator, under a reference between A. and B. administrator, award that B. shall pay a certain sum as the amount of A's demand, B. cannot afterwards object that he had no assets, for this is equivalent to determining as between these parties that he had, and therefore he may be attached for nonpayment (4). So a reference to arbitration of all matters in dispute by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon them as to assets (5). So trustees of an insolvent debtor, by entering into an arbitration bond, admit they have assets, and they may be attached on nonpayment (6). A foreign attachment in London, if properly pleaded, is a good bar to an action on an award (7), or on a bond conditioned for its performance (8); but where the submission is made a rule of court, it is no answer to an attachment in the king's bench for nonpayment of the sum awarded. (9)

(1) 6 Taunt. 561. 2 Marsh,
276. S. C.

(2) 5 Durnf. & East, 6.

(3) 3 Esp. Rep. 101.

(4) 7 T. R. 453.; and see,
1 T. R. 691.

(5) 2 Rose, 50.

(6) 2 Chitty's Repts. 40.

(7) 1 Sid. 327.

(8) 1 Lord Raym. 636. 3 Salk.
49. S. C.

(9) 4 T. R. 313. in notes.
Crompt. 270. 4 Taunt. 473.

Before any application is made for an attachment, or to set aside an award (1), the submission must be made a rule of court, if not one already, which is done on an affidavit by one of the witnesses, of the due execution of the bond or agreement contained in the submission; and if he refuse to make it, the court will compel him (2).

The remedy to compel performance of award.

At common law, where the submission to arbitration was by rule of court, which was often the case, the conduct of the arbitrators and of the parties to the submission might, as it still may, be examined into; and if, on examination, it appeared that the arbitrators had been partial and unjust, or had mistaken the law, the court would not enforce a performance of the award (4). But where the submission was by bond or other writing, or by parol, there was no other way of impeaching the award for the misbehaviour of the arbitrators, than by filing a bill in equity (5). This was remedied by the statute 9 & 10 Will. 3. c. 15. s. 2., which enacts, that "any arbitration or umpirage procured by corruption, or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties (6)." But this statute does not extend to such awards as are made in pursuance of an order of *nisi prius* (7), nor to parol awards (8), which therefore remain as at common law.

Relief against an improper award. (3)

The grounds upon which an application may be made to the courts for setting aside an award are, that there is some objection to its legality appearing on the face of the award itself, or from the reasons given by the arbitrators in support of it (9); or that the award does not follow the submission, or is too ex-

(1) 2 Str. 1178., and see 3 Moore, 64.

(2) 1 Str. 1. Barnes, 58. 1 Price, 308. See Tidd's Pract. 868.

(3) See Tidd, 7 ed. 872.

(4) 1 Salk. 71. 73. 83. 1 Mod. 21. 2 Burr. 701. 1 Saund. 327.

(5) 1 Saund. 327. b.

(6) Cowp. 23. Barnes, 55.

(7) 1 Str. 301. 2 Burr. 701.

1 Saund. 327. 6 East, 466.

(8) 7 T. R. 1. 1 Saund. 327. (c.)

(9) 3 East, 13. 18., and see

6 Taunt. 255. 1 Chitty, Rep. 674.

(a.) 2 Moore, 713.

Relief against an
improper award.

tensive or too limited (1); or that the arbitrator has exceeded his authority, or had no authority to make the award, or that his authority was revoked; or else that there has been some irregularity, as want of notice of the meeting (2), or collusion, or misbehaviour of the arbitrators (3); and if the application be made in due time, every ground of relief in equity against an award is equally open in a court of law (4). But the court of king's bench will not set aside an award on a suggestion that the arbitrator was mistaken in point of law, unless the principles of law upon which he has decided appear on the face of the award (5); and if a point of law be distinctly and expressly referred to the decision of an arbitrator, his award will be binding, even though the incorrectness of the decision appear on the face of the award (6). It is also a rule, that the courts will not enter into the merits at large upon which an award is founded; for if they did, no person, it is said, would ever undertake to be arbitrator (7). It is not sufficient, in order to impeach an award, upon the face of which no objection appears, to state facts from which it may be inferred that the award was founded upon an incorrect notion of the law of the case (8); and if the terms of an award be clear upon the face of it, the court will not admit an affidavit of one of the arbitrators to explain their intention (9). Where matters of law and fact are referred to an arbitrator, his award is final and conclusive; and if, in the award, he is silent as to the law, the courts will not interfere, though the award be wrong (10); so where a cause involving a question of law was referred to a barrister, under a rule of court to settle all matters in difference between the parties, and he made his award thereupon, but the question of law did not appear upon the face of the award, the court, considering that it was the intention of the parties to refer the decision of the merits, as well upon the matter of law as of fact, to the arbitrator, refused

(1) 2 Moore, 723. 3 Moore, 2 Moore, 713. 13 East, 357.
674. 7 East, 81. Caldew. 53, &c.

(2) 1 Salk. 71. 4 Moore, 148., (6) Qy. See 2 Mad. 6. 6 Ves.
but see 3 Atk. 529. 282. 9 Ves. 364.

(3) 3 Atk. 529. 2 Vern. 515.
485. 2 Burr. 701. Sturt v. Mog- (7) 1 Salk. 71. 1 Stra. 301.
geridge, E. T. 43 Geo. 3. K. B. 3 Atk. 529. 2 Bur. 701. 1 Saund.
Tidd's Pract. 872. 327. a.

(4) 3 Burr. 1258, 9.

(8) 1 Taunt. 48.

(9) 3 Moore, 241.

(5) 5 M. & S. 504. 3 Barn. &
Ald. 237. 1 Chit. Rep. 674. S. C.

(10) 1 Dowl. & R. 366.

to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties (1). The rule as to setting aside awards on the ground of the mistake of the arbitrator is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators, courts both of law and equity will interpose, the one by setting aside the award, the other by refusing to make it a rule of court (2); but a declaration of one of the arbitrators, that, had he seen a letter of which being mislaid at the time the contents were proved, he would have acted otherwise, does not fall within the reach of this rule (3). If an award be made on an improper stamp, and no application be made to enforce the award, the court will not set it aside (4); and if an objection to the stamp be not alledged as a ground for obtaining a rule to shew cause to set aside an award, the court will not suffer it to be relief upon afterwards when cause is shewn. (5)

Relief against an improper award.

A court of equity will not in general interfere to set aside an award, when the submission is either voluntary or under an order of nisi prius, except for corruption or improper conduct in the arbitrators, or where the award appears on the face of it to be contrary to the rules of equity, or to the prejudice of an infant, &c. (6). If the submission be by order of nisi prius, or in pursuance of 9 & 10 Will. 3., a court of equity will not entertain a bill to relieve against an award for corruption or partiality (7), unless the submission be not acted upon, or the court of law refuse to relieve upon application, or the time for complaining at law under the statute be elapsed (8). In bills to have an award set aside for corruption, it is usual to make the arbitrators defendants, together with the party in whose favour the award is made. The arbitrators may plead the award in bar, but they must shew themselves to have acted impartially, otherwise the court will make them pay costs.

(1) 13 East, 357. 1 Dowl. & R. 366. 1 B. & B. 80.

(2) Per Lord Eldon. 18 Ves. 449. See 2 Chitt. Repts. 44.

(3) Id.

(4) 7 T. R. 95.

(5) Liddell v. Johnstone, H. 38 G. 3. K.B. Tidd's Pract. 874.

(6) 1 Ch. Cas. 279. 2 Ves. 315. 1 Vern. 157. Ambl. 245. 2 Wils. 149.

(7) 14 Ves. 530. 2 Mad. 10.

(8) Id. Mont. tit. Award.

Relief against an improper award.

The application to set aside an award must be made in due time; and the court will not listen to an application to set aside an award for any defect whatsoever, after the time limited by the 9 & 10 Will. 3. c. 15. (1), though such defect appear on the face of the award (2). But upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award for any illegality apparent on the face of it, though the time for applying to set it aside be expired (3). In some cases, indeed, courts will interpose their authority, though the time prescribed should have elapsed (4); and a court of equity may relieve on manifest grounds, after the time required by the act for complaint at law, though no such complaint be made at all in the courts of common law. (5)

In an action to recover the sum awarded, the defendant cannot dispute the validity of the award, his proper course being to apply to the court to have it set aside (6). But where all matters in difference are referred, it is a good plea in bar to an action on the submission bond, that a particular defence was notified to the arbitrator before the award was made, and that he neglected to decide upon it (7); and an objection apparent on the face of an award may be urged in answer to a bill in equity for a specific performance (8), or in shewing cause against a motion for an attachment (9).

(1) 7 T. R. 73.

(2) 1 East, 276.

(3) 7 T. R. 73.

(4) 1 Marsh. 471. 6 Taunt.
111. S. C. 2 T. R. 781. 8 East,

466.

(5) Barnes, 75. 152.

(6) Gow. C. N. P. 5. 8 East,
344. 2 Wils. 148. 1 Marsh. 238.
3 Taunt. 378.

(7) 16 East, 58., and see Cro.
Eliz. 838.

(8) 1 Ca. in Ch. 279.

(9) 7 T. R. 73.

CHAP. XVI.

Of Set Off and Mutual Credit.

WE will next consider the remedy, if it may be so expressed, Set off. (1)
by means of a set off, or cross demand, or mutual credit.

At common law, and independently of the statutes of set off, a defendant is entitled to retain or claim, by way of deduction, all just allowances or demands accruing to him, or payments made by him in respect of the same transaction or account, which forms the ground of action. This cannot be termed a set off in the strict legal sense of the word, because it is not in the nature of a cross demand or mutual debt, but rather constitutes a deduction, rendering the sum to be recovered by the plaintiff so much less (2). So where demands originally cross, and not arising out of the same transaction, have, by subsequent express agreement, been connected, and stipulated to be deducted or set off against each other, the balance is the debt and the only sum recoverable by suit, and cannot strictly be called a set off. (3)

But before the statutes of set off were, there were mutual cross demands, unconnected with each other. A defendant could not in a court of law defeat the action by establishing that the plaintiff was indebted to him even in a larger sum than that sought to be recovered, and relief could only be obtained in a court of equity (4). To remedy this inconvenience, it was enacted by the 2 Geo. 2. c. 22. s. 13., "that where there are mutual debts between the plaintiff and defendant, or if either party

(1) As to set off, and mutual credit in general, see *Montague's Set off*. 1 Chitty on Pleading. Selwyn's Ni. Pri. 146.

(2) 1 Bla.R. 651. 4 Burr. 2133. 2221., and other cases collected in *Montague's Set off*, 1, 2, 3. Custom in hat trade of deductions, see 1 Stark. 343. If captain sells goods for repairing vessel, owner

may deduct amount of them sold against freight, 1 Stark. 890.

(3) 5 T.R. 135. 3 T.R. 599. 3 Taunt. 76. 2 Taunt. 170. *Montague on Set off*, 1, 2, 3, and 28 note (2 p.).

(4) 2 Burr. 820. 1230. 4 Burr. 2220. *Montague on Set off*, 1, 2, 3, 15.

sue or be sued as executor or administrator (1), where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." This clause was made perpetual by 8 Geo. 2. c. 24. s. 4.; and it having been doubted whether mutual debts of a different nature could be set against each other (2), it was by the last mentioned statute (3) further declared, "that by virtue of the said clause mutual debts may be set against each other, either by being pleaded in bar, or given in evidence under the general issue in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue, by reason of a penalty contained in any bond or specialty; and in all cases where either the debts for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid." These statutes were passed for the benefit of the defendants, and they are not imperative, so that a defendant may waive his right to set off, and bring a cross action for the debt due to him from the plaintiff, if it exceeds that due to the plaintiff (4), and where he is not prepared at the time the plaintiff sues him to prove his cross demand, it is most

(1) Before the stat. 8 Geo. 2. c. 24. s. 5. it was considered that to an action by an executor on a specialty, the defendant could not set off a simple contract debt. *Selw. N.P.* 4th edit. 544., 5. n. 40.; but that statute allows such set off.

(2) *Willes*, 262. *Selwyn's N.P.* 4 ed. 544., 5. n. 39, 40.

(3) Sect. 5.

(4) 2 *Camp.* 595. 5 *Taunt.* 148. How the plaintiff may prevent such cross action, by allowing the set off, and having it so indorsed on the postea, 1 *Camp.* 252. post.

advisable not to plead or give notice of set off, for in case he should go into evidence upon the trial in support of his cross demand, and fail in the attempt, he cannot afterwards proceed in a cross action for the amount, and the party cannot bring an action for what he has succeeded in setting off in a former suit against him, though, if the set off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein might then maintain an action for the surplus (1).

There is a difference upon a set off in *equity* and at law. In equity it prevailed long before the statute. But in equity it must be a strict set off sustainable at law, or a case of mutual debt or credit (2), though under circumstances in a court of equity, a joint debt may be set off against a separate demand. (3)

With respect to the nature of the demands to be set off against each other, it is observable that the statutes only speak of mutual *debts*, therefore the demand, as well of the plaintiff as of the defendant, must be a debt, and a set off is not allowed in actions or claims for torts, as upon the case, trespass, replevin, or detinue (4). The only actions in which a set off is allowed, are assumpsit, debt, and covenant for the nonpayment of money, and for which an action of debt or indebitatus assumpsit might be sustained (5); or where a bond in a penalty is given for securing the payment of money or an annuity (6), or, at least, stipulated damages (7). But where the demand is for uncertain damages (8), although secured by penalty (9), a set off is not allowed; as for not delivering goods according to contract (10); for injuring goods delivered to the plaintiff to be carried (11); not repairing, whereby defendant was obliged to pay money (12); not

(1) 3 Esp. Rep. 104.

(2) 19 Ves. 467.

(3) 3 Meriv. 618.

(4) Bull. Nisi Prius, 181. 4 T. R. 512. 1 Bla. Rep. 394. Per Lawrence, J. 7 T. R. 47. Montague, 18.

(5) 2 Bla. Rep. 911. * Cowp. 56, 57. Willes, 261. Bull. N. P. 179. Selw. N. P. 4 ed. 547.

(6) 2 Burr. 820.

(7) 2 T. R. 32. Montague, 22.

(8) 1 Bla. Rep. 394. 2 Bla. Rep. 910. Cowp. 57. 6 T. R. 488. 4 Esp. Rep. 209. 4 Taunt. 137. 3 Camp. 32. Montague, 22. 5 M. & S. 439.

(9) 2 Burr. 1024. Bull. N. P. 179, 180. Willes, 261. Selw. N. P. 4 ed. 147.

(10) 1 Bla. Rep. 394. * Cowp. 57.

(11) 2 Bla. Rep. 910.

(12) 6 T. R. 488.

insuring (1); for not indemnifying (2); not giving a bill of exchange in payment for goods sold (3); or specially for not paying on a particular day or event a sum of money, though if the plaintiff declare generally for the debt a set off will then be admissible (4); and though it has been considered that a demand for goods bargained and sold, and which the defendant has refused to receive, may be set off, it seems questionable, when they have been resold, whether such a demand is available as a defence (5). So in an action of debt on a policy of insurance against the Royal Exchange company for an average loss which has not been adjusted, premiums of insurance cannot be set off, the plaintiff's demand being for unliquidated damages (6); and a guarantee to the amount of a certain sum of money given for a third person cannot be the subject of a set off (7); so, as only a money demand can be set off when an action upon a bail bond is brought in the name of the sheriff, the defendant cannot plead a set off, though it is said that it may be otherwise when the action on such bail bond is in name of the assignees (8). The defendants bringing an action, or obtaining a verdict for a debt, is however no waiver of the right to set off the debt (9); and a judgment may be pleaded by way of set off, though a writ of error be pending upon it (10); but it should seem, that the taking the plaintiff in execution upon a judgment does for this purpose satisfy the debt (11); and a judgment recovered by the defendant, after the commencement of the plaintiff's action, cannot in that action be set off as a judgment debt, and the defendant must plead, or give notice of the original debt, as the ground of his set off, because the subject-matter of every set off must have been a debt at the time the action was commenced (12); but where the plaintiff declares specially where he might recover

(1) 1 Taunt. 137.

(2) 5 Barn. & Ald. 93.

(3) 3 Camp. 329.

(4) 1 Esp. Rep. 378.; sed vide 1 East, 375. 2 M. & S. 510. 13 Ves. jun. 180.

(5) Peake's Rep. 41. Montague, 21. 4 Esp. Rep. 251. 6 Taunt. 162. 1 Marsh. 514.

(6) 1 M. & S. 499. 5 M. & S. 439.

(7) 4 Esp. Rep. 407. 2 Brod. & Bing. 89.

(8) Willes, 261. Bull. N. P. 179. Selw. N. P. 4 ed. 546. Montague, 28.

(9) 2 Burr. 1229. Peake's Rep. 210. 3 T. R. 186. 4 East, 507. Bull. N. P. 180. Selw. N. P. 4 ed. 144. Montague, 38.

(10) 3 T. R. 188. in notes. Dougl. 112. Montague, 36.; sed vide 2 H. Bla. 372.

(11) 5 M. & S. 103.; sed vide 1 Taunt. 426. 1 M. & S. 696. 3 East, 258.

(12) Dougl. 112. 3 T. R. 186.

the same sum under the common counts, as in assumpsit, for not accounting with a count for money had and received, the defendant will, under a notice of set off, be entitled to the benefit of his set off. (1).

The debt to be set off must also be a *legal*, subsisting, and continuing debt to the defendant, and therefore he cannot avail himself upon this plea of a bond debt of the plaintiffs assigned to the defendant by another, to whose use it was originally given (2); and it should seem, notwithstanding some decisions to the contrary, that the cestuique trust of a bond, originally given to a third person for his use, cannot set off the amount in an action against him by the obligor (3); so the legal title of the defendant to the debt may be examined into, to defeat his set off; and to an action by assignees of a bankrupt, the defendant cannot set off bills held by him as trustee for another person (4). And a demand barred by the statute of limitations, being in law no longer subsisting, cannot be set off, and if pleaded in bar to the action, the plaintiff may reply the statute of limitations (5); or if attempted to be given in evidence on a notice of set off, it may be objected to at the trial (6). An attorney, however, may set off his bill, though it was not delivered a month before the commencement of the action; it ought, if possible, to be delivered time enough to be taxed, and at least should be delivered sufficiently early to prevent the plaintiff being taken by surprize at the trial. (7)

The statutes, in terms only, authorize the setting off of *mutual debts*, and therefore, as well the debt sought to be recovered, as that to be set off, must be due in the *same right*, and consequently, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one (8), unless it be so expressly agreed by all the parties (9); but a debt on a joint and several bond of several persons may be set off to an action brought by only one of the obligors (10). And a debt on a bond,

(1) 4 Camp. 385.

(2) 16 East, 36.

(3) 7 East, 172. acc. 1 T.R. 621. Montague, 27. Tidd, 6 ed. 696. contra.

(4) 16 East, 136. 139, & 140.

(5) 2 Stra. 1271. Peake's Rep. 121. Montague, 20.

(6) Bul. N. P. 180.

(7) Dougl. 195. 199. 1 Esp.

Rep. 449. Montague, 36.

(8) 2 Taunt. 173. Montague, 23.; and cases there cited. 5 M. & S. 439.

(9) 2 Taunt. 170.

(10) 2 T. R. 32.

purporting to be joint and several, but executed by only one of the obligors, may be set off to an action commenced by the obligor who has executed it (1). So a debt due to a defendant as surviving partner may be set off against a demand on him in his own right, and *vice versa* (2). And if a firm be carried on in the name of only one person, a separate debt due from that person may be set off to an action at the suit of all the parties (3). And if a person give a note to his bankers on account of a debt due to them, and the bankers indorse the note to another firm, consisting of some of the partners in the banking house, the maker of the note may set off any debt due to him from his bankers, to an action commenced against him on the note by the firm who hold it (4); but the directors or trustees of a company cannot set off a debt due to them as individuals against a demand upon them in their corporate capacity for stock, unless there was an express bye-law to subject the stock of each member to a satisfaction of the debt which he owes to the company, in which case such bye-law being reasonable, the debt may be set off. (5)

Principal and agent.

As to principal and agent, it has been laid down by Lord Mansfield (6), and since repeatedly recognized as law, that "where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the principal." A commission *del credere* has been held a presumptive proof of an agent dealing as principal (7); and where a factor was authorized to sell goods in his own name, and he made the buyer debtor to himself, though the goods, when sold, were marked with the name of his employer, and the factor sold as such in the usual course of his business, and that fact was known to the buyer, this was held to be a dealing as principal (8). To a demand of an agent who deals as prin-

(1) 2 T. R. 32.

(2) 5 T. R. 493. 6 T. R. 582.
1 Esp. Rep. 47. 2 T. R. 476.

(3) 7 T. R. 361, note c. 2 Esp.
R. 469. S. C. 2 Taunt. 324, 5.

(4) Peake Rep. 197. Montague, 26.; sed quære.

(5) 1 Stra. 639. Montague, 28.

(6) 7 T. R. 360. n. a.; also
George v. Clagett, 7 T. R. 359.
1 M. & S. 576. 2 Marsh. 501.

Holt, C. N. P. 124., in notes.
Montague 29. 33.

(7) 7 T. R. 359.

(8) Cowp. 251. 1 M & S. 576.
2 Marsh. 501.

principal, the buyer cannot set off a debt due to him from the real principal (1); and if an agent sells goods as his own, or has a lien upon them, and does not part with the goods, unless the purchaser expressly agrees to pay him, then the purchaser in an action brought against him by such agent for the price of the goods, cannot set off a debt due from the owner to the purchaser. (2)

Principal and agent.

A policy broker who makes an insurance in his own name for the benefit of his principal, and has a *del credere* commission, may set off the amount of adjusted losses and returns of premium in an action brought against him by an underwriter for premiums (3); but where the insurance is made by the broker in the name of his principal (4), or he has not a commission *del credere* (5), the losses and returns of premium, not being mutual debts, cannot be made the subject of a set off (6). If, however, an action be brought against a policy broker, by the assignees or executors of an underwriter, for premiums, where the insurance was made by the broker in his own name on a *del credere* commission, the defendant may set off the amount of losses happening and adjusted before the act of bankruptcy, or returns of premium becoming due before the bankruptcy or in the life-time of the testator (7). But a broker, who is indebted to the assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, is not entitled to set off returns of premium due upon the arrival of ships after the bankruptcy (8). Also in an action by the executors of an underwriter against a broker for premiums due on policies subscribed by the testator, the defendant cannot set off returns of premium which became due after the testator's death (9); and an underwriter cannot set off as a mutual credit, in an action against him for a loss accruing after the bankruptcy of the assured, premiums on the same and other policies due before the bankruptcy from the assured, who was himself his own insurance

(1) Cowp. 251. 1 M. & S. 576. 2 Esp. R. 493.

(2) 2 Chitty's Reps. 387. *Minchin v. Holland*, K. B. Trin. T. 1823. 7 T. R. 359.

(3) 1 T. R. 112. 285. 2 M. & S. 112. 423.; and see Holt, C.N.P. 89. to 94. in notes. 4 Canabp. 396.

(4) 1 M. & S. 494. 2 M. & S. 112.

(5) 16 East, 382. Marsh. Ins. 1 ed. 204. 2 Marsh. R. 215.; but see 2 M. & S. 112. 423.

(6) *Id.* *ibid.*; but see 4 Camp. 396. 400.

(7) 1 T. R. 115. 285. 2 Camp. 586. 12 East, 507. 4 Taunt. 534. 2 Marsh. 138.

(8) 4 Taunt. 534. 4 Camp. 396.

(9) 2 Marsh. 138. Holt, 88.

Principal and
agent.

broker in effecting those policies; nor can he set off returns of premium upon voyages not complete before the bankruptcy, although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured either for a loss or return of premium (1). And in an action at the suit of the assured, against an underwriter for a loss, the latter cannot set off the premiums, although they have never been paid, unless he can make it appear that the state of the relative accounts between assured broker and underwriter is such as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured that he has paid the premium to the underwriter. (2)

Husband and
wife.

A debt due to a husband in right of his wife cannot be set off in an action against him on his own contract (3); and on the other hand, a debt of the wife's, *dum sola*, cannot be set off against a claim made by the husband alone, unless after the marriage he make the debt his own by some promise to pay, made in writing, in consideration of forbearance, or some other new consideration (4). So a debt from a bankrupt to a married woman *dum sola* cannot be set off against a debt due from the husband to bankrupt (5). So a debt from an executor in his own right cannot be set off against a debt to the testator (6), even though the executor is residuary legatee (7): so a debt which accrued to the defendant in the life-time of the testator, cannot be set off against a debt that accrued to the executor, even in that character, after the testator's death. (8)

In bankruptcy.

It was formerly holden, that a set off was not available against the assignees of a bankrupt (9); but it was afterwards determined that the statutes of set off extended to cases of bankruptcy, and that in an action at the suit of assignees, the defendant may set off a debt due to him at the time of the bankruptcy (10); and further to extend the benefit of setting off mutual demands in

(1) 4 Taunt. 775. 4 Camp. 336.
5 M. & S. 498.

(2) 4 Taunt. 246. 3 Taunt.
493, 497.

(3) Bull. N. P. 179.

(4) 2 Esp. Rep. 594. 7 T. R.
348.

(5) 19 Ves. 465.

(6) 3 Atk. 691.

(7) 3 Atk. 691.; but semble that
equity would relieve where there
is a residue.

(8) Bul. N. P. 180. Willes.
103, n. l. 264. n. a. Monta-
gue, 34. Selwyn's N. P. 4 ed.
145. b.

(9) 1 Wils. 155.

(10) Cowper, 133.

cases of bankruptcy, it is enacted by 5 Geo. 2. c. 30. s. 28. (1), ^{in bankruptcy.} that where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more shall be claimed or paid on either side respectively; and again, by the statute 46 Geo. 3. c. 135. s. 3., it is provided, "That in all cases where under commissions of bankrupt hereafter to be issued, it shall appear that there has been mutual credit given, or mutual debts between the bankrupt and another person, one debt or demand may be set off against another, notwithstanding a prior act of bankruptcy committed before such credit was given, or such debt contracted, provided such credit be given two calendar months before the date and suing forth of such commission, and provided the person claiming the benefit of such set off had not, at the time of such credit given, any notice of such prior act of bankruptcy committed by the bankrupt, or that he was insolvent or had stopped payment." (2) Under this section, it has been held that a sale of the property of a bankrupt after an act of bankruptcy, but more than two months before the commission is issued, is a sale by the bankrupt and not by the assignee; and a creditor of the bankrupt having become purchaser might, in an action by the assignee for the value of the goods, set off against such claim the debt due to him from the bankrupt, this constituting a mutual credit (3). It has been considered, that the term *mutual credit* in the statute 5 Geo. 2. c. 30. is more comprehensive than the word debt in the general statutes of set off (4); and that even a demand for unliquidated damages claimable for a breach of contract (5), or an equitable demand, may be a credit

(1) See 46 Geo. 3. c. 135. s. 3. 49 Geo. 3. c. 121. s. 1.
49 Geo. 3. c. 121. s. 1.

(3) 1 B. & A. 471.

(2) As to that part of this section which makes the striking of the docket notice of the prior act of bankruptcy, it is repealed by

(4) 7 T. R. 380. 1 Atk. 228.

1 P. W. 325. 1 M. & S. 499. 1

Marsh. 187. Montague, 49.

(5) 1 M. & S. 499.

In bankruptcy. within the statute (1). But these decisions seem in some degree qualified by later ones; and it has been held, that in order to constitute a mutual credit within this statute, it must be confined to pecuniary demands on such credits only as in their nature will terminate in a debt (2); and therefore a guarantee against contingent damages cannot form the subject of a mutual credit or set off under it (3). And it has been held, that if goods specifically pledged remain in the possession of the bailees, and in the meantime the owner becomes insolvent (having committed acts of bankruptcy before the original pledge was entirely redeemed by the repayment of the money secured by it), should other advances be then made to him by them, it was not a case of mutual credit within the statute, and that the assignees might recover the goods in trover (4). But where D. and another purchased goods of two London houses, and shipped them upon speculation to a foreign port in the name of C., and not wishing to appear as principals in the transaction, represented to the London houses, and to the consignees abroad, that C. was the principal and they merely his agents; and after the shipment, the London houses made advances to D. and his partner, as agents of C., on account of the goods, the proceeds of which remained in the hands of the consignees abroad, and C. also advanced money to D. and partner, who afterwards became bankrupts, and at the date of the commission were indebted to C. for such advances; it was held in an action by the assignees for money had and received, that C. had a right to retain the proceeds of the goods, as a set off for money advanced to the bankrupts (5), and to bring a case within the meaning of this act, the debt or credit must have existed in favour of the defendant previous to the act of bankruptcy, and therefore a note indorsed to him afterwards, though issued by the bankrupt before, cannot be set off, and he must prove the act of bankruptcy (6). Though where the defendant offers to set off several small notes of the bankrupt, proof that he received some notes before bankruptcy, coupled with absolute production of notes corresponding in sums, suffices without proof of the identity of those received and those produced (7); and though the defendant may not be able to shew that he has a strict legal demand upon the bankrupt

(1) 1 M. & S. 499.

(2) 2 Moore, 547.

(3) 2 Brod. & B. 89.

(4) 5 Price, 593.

(5) 1 Dowl. & R. 530.

(6) 6 T. R. 57. 46 Geo. 3. c. 135. s. 3.

(7) 2 Marsh. 209.

previous to the act of bankruptcy, so as to bring his case ^{In bankruptcy.} within the ordinary law of set off (1); yet it will suffice if he can establish that there was some connexion in the origin of the transaction, to bring it within the operation of the statute relative to mutual credit (2); but it has recently been decided that this statute does not apply where only one of several partners has become bankrupt. (3)

By the 19th Geo. 2. c. 32. s. 2. it is provided, that the assured in any policy made upon good and valuable consideration shall be admitted to claim, and after the loss or contingency shall have happened (4), to prove his or her debt, in like manner as if the loss had happened before the commission issued (5), and shall receive a proportionable dividend in like manner, and the bankrupt shall be discharged from the debt on the policy, in like manner to all intents and purposes as if such loss happened before the commission issued. This statute relates to the case of a bankrupt underwriter. But as the set off is allowed in such case, by parity of reason it would be allowed on the part of a bankrupt assured; and an underwriter, in an action by the assignees of a bankrupt assured upon a loss which happened after the bankruptcy, may set off a sum due to him for premiums on the balance of accounts between the bankrupt and himself. (6)

Besides these modes of deduction, in cases of connected accounts at common law, and of set off and mutual credit, in cases of bankruptcy, of which we have seen the defendant may avail himself as a matter of right in defence of the action, opposite demands, as well as debts for costs, founded on cross judgments, may, by the practice of courts, in many cases, be set off against each other, on a summary application to the court; but this is a subject not within the object of this work to consider. (7)

(1) 2 Geo. 2. c. 22. s. 13. and 8 Geo. 2. c. 24. s. 4.

(2) 5 Geo. 2. c. 30. s. 28. 4 Taunt. 888.

(3) 1 Marsh. 184.

(4) This relates to prospective and possible loss, 5 M. & S. 500.

(5) This is a case of policy of insurance relating to the assured.

I omit therefore what relates to the obligors on bottomree and respondentia. Per Ellenb. C. J. 5 M. & S. 500.

(6) 5 M. & S. 498.; see 4 Taunt. 775.

(7) See case, Tidd's Prac. 7 ed. 1006, 7. Hullock on Costs, 457, &c.

CHAP. XVII.

Of the Defences to Actions on Contracts, and especially under Statutes of Limitation.

Of defences to actions, and proceedings on contracts, founded on statute of limitations.

WITH respect to the defences which a party may make to an action on a contract, they may principally be collected from the previous parts of the work, where we have considered the consequences of the want of a sufficient ability to contract, of an insufficient contract or consideration or stamp, or non-observance, by the party suing, of something to be done or omitted on his part; and it remains for us here only to consider that defence which arises from the omission of the plaintiff to sue within the time limited by the legislature, and which is given by the statutes of limitation. The statute, 21 Jac. 1. c. 16. enacts “that all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract, without specialty, all actions of debt for arrearages of rent, shall be brought within six years next after the cause of such actions, and not after.” (1) Provided any judgment be reversed by error, or arrested after verdict for the plaintiff, or be brought by original, whereon the defendant is outlawed and the outlawry reversed, the plaintiff may have a new action in a year after such reversal or arrest of judgment, and not after. Provided an infant, feme covert, non compos, or person in prison, or beyond sea, at the time of the cause of action accruing, shall have liberty to bring an action within six

(1) Contracts founded on specialties are not within the statute, as a warrant of attorney, 2 Stark. 254. A bill of exchange is affected by this statute, and must be sued for within six years after it is payable, Carth. 3. It was once doubted whether this statute extended to mariners' wages, 3 Salk. 227, 228.; but the statute of 4 Anne, c. 16. s. 17. puts the ques-

tion at rest, by enacting that all suits and actions in the court of admiralty, for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after. It extends to an action for attorney's fees. *Oliver v. Thomas*, 3 Lev. 367., or to an action for rent on a parol demise. 1 B. & A. 625.

years after being of full age, discoverd, of sane memory, at large, or returned from beyond the sea.

Of defences to actions and proceedings on contracts.

The object of this statute was to protect individuals against forgotten claims of so obsolete a nature that the evidences relating to the contract might probably be no longer to be found, and thereby might lead to perjury; and it proceeds also upon the supposition that the debtor had paid, but after a lapse of time may have lost his voucher (1). In cases, therefore, where there is an acknowledgment of the debtor or contractor to prove the existence of the debt or obligation, or an express promise to pay or perform the same, the statute will not operate to protect him, notwithstanding the lapse of six years or more since the cause of the action may have accrued. The slightest acknowledgment has been held to be sufficient (2), as where the debtor exclaimed to the plaintiff, "What an extravagant bill you have delivered me." (3) So where the defendant met a man in a fair, and said that he went there to avoid the plaintiff, to whom he was indebted; this was held to save the statute (4). A. said to B. "You owe me so much," B. said "No, but we will settle the account;" this saves the statute (5). If a debtor say, "Prove it due, and I will pay you," this is sufficient to take the debt out of the statute (6). The construction of an ambiguous letter or declaration by a defendant on being served with a writ, or requested to pay a debt, neither admitting or denying it, is strong intimation that it is an acknowledgment, since, if the defendant knew he owed nothing, he would have declared it (7). An admission by the defendant that the debt was once owing saves the operation of the statute of limitations, though he relies on the statute at the time (8); so does an acknowledgment that the defendant was once liable, but was not at the time of acknowledgment, because the demand was out of date, and that he would not then pay, it was not in his power to pay, without proof of ability (9): so a conditional promise to pay when able, or by in-

(1) See 5 M. & S. 76., per Bayley, J. 3 B. & A. 142. per Abbott, J.

(2) 2 Burr. 1099. Bul. N. P. 149. Cowp. 548.

(3) Peake, N. P. 93.

(4) Loft. 86.

(5) Loft. 87.

(6) Carth. 471. Salk. 29. 5 Mod. 426.

(7) 2 T. R. 760.

(8) 16 East, 420. 4 East, 599. 2 Cowp. Loyd v. Maud. 2 T. R. 760. 4 East, 604. n. acc. 3 Taunt. 379. cont.

(9) 16 East, 420. 2 Stark. 98, 99. note, and cases there cited.

Of defences to actions, and proceedings on contracts.

instalments, &c., is sufficient, without proof of ability or waiting till instalments become due (1). So if a man admit that he was once liable, but that he was discharged by a particular mode of performance, to which he with precision referred himself, and where he has designated that time and mode of performance so strictly that he can say it is impossible it had been discharged in any other mode, there the courts have said, that if the plaintiff can disprove that mode he let himself in to recover, by striking from under the defendant the only ground on which he professes to rely (2): so where a party acknowledges, but refuses to pay the debt, relying on the deficiency of his legal liability to pay, this will take the case out of the statute, upon proof of liability (3). But a qualified admission by a party who relies on an objection which would at any time have been a good defence to the action, does not take the case out of the statute, as if the defendant said, "If you had presented the protest the same as the rest, it would have been paid; I had then funds in the acceptor's hands (4)," this was held no sufficient acknowledgment; and where the defendant, an executor, who was sued for money had and received from his testator, was proved to have said, "I acknowledge the receipt of the money, but the testatrix gave it me," a verdict was found for the defendant notwithstanding (5); and unless the defendant actually acknowledge that the debt or obligation did exist, the statute will not in any case be avoided (6); and where the defendant said, "The testator always promised not to distress me," this is no evidence of acknowledgment of the debt to take the case out of statute (7); and so where in assumpsit by an attorney to recover his charges relative to the grant of an annuity, evidence that the defendant said "He thought it had been settled when the annuity was granted, but that he had been in so much trouble since, that he could not recollect any thing about it," is not a sufficient acknowledgment of the debt to save the statute, notwithstanding proof that plaintiff's bill was not paid when the annuity was granted (8). The referring plaintiff to the defendant's

(1) *Id. ibid.* 5 M. & S. 75.

(2) 7 Taunt. 608. 4 B. & A. 568. 1 Salk. 29. Cowp. 548. Peake, N. P. C. 93.

(3) 5 M. & S. 75.

(4) 1 Stark. 7. See 3 Esp. N. P. C. 155. 2 Camp. 161. 2 B. & A. 759. 4 B. & A. 688. 4 East,

599, and cases there cited.

(5) Bull. N. P. 148.

(6) 4 Maule & S. 457. 2 Camp. 160.

(7) 6 Taunt. 210.

(8) 1 B. Moore Rep. 340. 7 Taunt. 608. S. C.

attorney, who, he added, was in possession of his determination and ability, is not an admission that any thing is due (1). Payment of money into court upon a special count will save the operation of the statute (2), and the acknowledgment after action brought is good (3). The admission of the debt to a third person is sufficient to take the case out of the statute. (4)

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If a demand is owing from two parties, an acknowledgment by one will avoid the statute (5); so an acknowledgment by one of several drawers of a joint and several promissory note, will take the case out of the statute as against any one of the other drawers in a separate action on the note against him (6); and in an action against A., on the joint and several promissory note of himself and B., to take case out of the statute, it is enough to give in evidence a letter written by A. to B. within six years, desiring him to settle the debt (7): but the acknowledgment of one partner to bind the other must in such case be clear and explicit, and therefore it is not sufficient, in order to take a case out of the statute in an action on a promissory note, to shew a payment by a joint maker of a note to the payee within six years, so as to throw it upon the defendant to shew that the payment was not made on account of the note (8). It has been held that when one of two drawers of a joint and several promissory note having become bankrupt, the payee received a dividend under the commission on account of the note, this will prevent the other drawer from availing himself of the statute in an action brought against him for the remainder of the money due on the note, the dividend having been received within six years before the action brought (9). But in a recent case, when one of two joint drawers of a bill of exchange became bankrupt, and under his commission the indorsee proved a debt beyond the amount of the bill for goods sold, &c., and they accepted a bill as a security they then held for their debt, and afterwards received a dividend, it was held that in an action by the indorsees of the bill against the solvent partner, the statute of limitations was a good defence,

(1) 1 New Rep. 20.

(2) Bunb. 100.

(3) Selw. N. P. tit. Limitation. Burr. 1099.

(4) 3 B. & A. 141. Loft. 86.

(5) 4 T. R. 516.

(6) Dougl. 652.

(7) 3 Camp. 32., and see

11 East, 585. 1 Stark. 81.

(8) 2 Stark. 488.

(9) 2 H. Bla. 340.

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although the dividend had been paid by the assignees of the bankrupt partner within six years (1). An acknowledgment by an agent, or servant intrusted by the defendant to transact his business for him, is sufficient to take the case out of the statute; and in an action against a husband for goods supplied to his wife for her accommodation, while he occasionally visited her, a letter, written by the wife acknowledging the debt within six years, is admissible evidence to take the case out of the statute (2).

If there is mutual credit between two parties, though the items on one side are above six years old, yet, if any one item on the other side has arisen within six years from the time the last item on the former side was due, all the items on the former side of the account will take the case out of the statute (3); but where all the items are on one side, so that the account is not mutual, as for instance, in an account between a tradesman and his customer, the last item which happens to be within six years, shall not draw after it those which are of a longer standing (4).

Merchants' accounts.

The exception in the statute respecting such accounts as concern trade of merchandize between merchant and merchant, their factors and servants, upon which actions need not be brought within six years, only extends to those cases where there are mutual and reciprocal accounts and demands between two persons, and where such accounts are current and open, and not to accounts stated between them (5), for no other actions are excepted but actions of account (6). It has been considered, that by the effect of the above exception there can be no limitation to a merchant's open and unsettled account: this opinion however appears erroneous, and if there is no item in the account, or acknowledgment of the debt within six years, the statute will

(1) *Brandram v. Wharton*, 1 Bar. & Ald. 463.

(2) 1 Camp. 394. 2 Esp. N. P. C. 511. 5 Esp. N. P. C. 145.

(3) 6 T. R. 189, and see post, as to merchants' accounts.

(4) Bul. N. P. 149.

(5) *Webber v. Tiril*, and *Welford v. Liddel*, 2 Ves. 400. *Cotes v. Harris*, Bull. N. P. 149. Sir

J. Sandys v. Blodwell, Sir W. Jones, 401. 1 Sid. 465. 1 Vent. 89.

(6) *Carth. 226. Chevely v. Bond*, 1 Show. 341. S. C. 2 Saund. 127. a. 2 Mod. 312. and 1 Mod. 70. 1 Lev. 298. 4 Mod. 105. *Cranch v. Kirkman, Peake*, 121. 1 Vern. 456. 2 Vern. 276.

take effect; but, as we have before seen, if even the last item of the account is within six years, that preserves all the preceding items of debt and credit from the operation of the statute (1); and from these decisions it appears that merchants' accounts stand not upon better grounds in regard to the statute than other parties. The exception extends to all merchants, as well inland as to those trading beyond sea (2); and the effect of the exception has also been extended to other tradesmen, and persons having mutual dealings (3). But in all these cases the accounts must be mutual, together with reciprocal demands on each side, and not as in the case of a tradesman and his customer, where the items of credit are all on one side. (4)

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The statute does not begin to take effect till the cause of action is complete, and the party is capable of suing on it (5). No action lies against a consignee of goods for sale for not accounting and returning the goods undisposed of until demand, and therefore the statute does not begin to run until that time, when demand is made (6). The statute begins to operate only from the time when a bill of exchange or promissory note, &c. is due, and not from the date (7). It has been held, however, that notes payable on demand run from the date of the note, and not from the time of the demand (8). Where a payee of a bill of exchange was dead at the time the bill became due, it was held that the statute did not begin to run until letters of administration were taken out (9); but where the cause of action is complete in the life-

As to what time the statute begins to take effect.

(1) *Jones v. Peryree*, 6 Ves. 580. *Duff v. E. I. Comp.* 15 Ves. 198. *Barber v. Barber*, 18 Ves. 286. *Welford v. Liddel*, 2 Ves. 200. acc. Opinion of Lord Hardwicke, mentioned in 19 Ves. 185. *Catling v. Skoulding*, 6 T. R. 189. 192. cont.

(2) *Cranch v. Kirkman, Peake*, C.N.P. 121. 2 Saund. 127. b. acc. *Chan. Ca.* 152. cont.

(3) *Catling v. Skoulding*, 6 T. R. 189. *Cranch v. Kirkman, Peake*, N. P. 127. overruling; see vide 7 Mod. 270. cont.

(4) *Cotes v. Harris, Bull*, N.P. 149.

(5) *Cro. Car.* 139. 1 *Lev.* 48. *Salk.* 442.

(6) 1 Taunt. 572.

(7) 1 H. B. 631. 5 B. & A. 212. *Carth.* 3.; as to the point when the statute of limitations begins to run on a note payable on demand, Taunt. 575. *Sir W. Jones*, 194. *Godb.* 437. 12 Mod. 444. 15 Ves. 487.; and see 2 Stark. 232. 10 Mod. 294. 2 Taunt. 232. *Chitty on Bills*, 6 ed. 373.

(8) 2 Selw. 4 ed. 131. 359. *Cro. Eliz.* 548. 10 Mod. 38. 3 *Salk.* 227. *Chitty on Bills*, 6 ed. 249. *Sed quære*, see 14 East, 500. 3 Camp. 459. 1 Taunt. 575, 6. *Sir W. Jones*, 194. *Godb.* 437. 12 Mod. 444. 15 Ves. 487.

(9) 5 B. & A. 212. *Skin.* 555.

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time of the testator, then the statute begins to run from that time, and not from the granting of the probate. (1)

The second provision in the statute of James, respecting infants, &c., only relates to the plaintiff's and not defendant's infancy, &c. (2); but by 4 & 5 Ann. c. 16. s. 19. the effect of this provision is extended to defendants being beyond sea at the time of the cause of action accruing; and if the defendant be abroad at the time of making the contract, he need not be sued until six years after his first return here (3). The statute of limitations extends to persons absent in Scotland (4), but not those in Ireland (5), the latter being considered as beyond the sea within the meaning of the above provision; and foreigners living beyond the sea have the same advantage of the proviso as natives residing here (6). Though the demand be on a bill of exchange, the plaintiff's absence beyond sea saves the statute (7). Where the cause of action accrues within the jurisdiction of the supreme court at Bengal, whilst the parties are resident there, the statute of limitations, as far as respects a suit in this country, begins to run only from the time of their concurrent presence here. (8)

When once the statute has began to run, nothing stops its course; as where a tenant in tail leaves two sons infants, and the eldest having attained twenty-one, dies without issue, the statute begins to run against his brother, though a minor (9); and if the plaintiff be in England when the cause of action accrues, the time of limitation begins then to run, and a subsequent departure from the kingdom, and going abroad the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time (10). So, if there are several partners, and some are in England at the time when the cause of action accrues, and others beyond the seas, the action must be brought within six years next after the cause of action accrues, notwithstanding the absence of the partners beyond the seas. (11)

(1) Willes, 27.

(2) Carth. 136. 226. 6 Show. 99. Salk. 420.

(3) 2 Saund. 121. a. b. Vide 19 Ves. 200.

(4) 1 Bla. R. 286.

(5) Per Holt, C. J. in Anon. 1 Show. 91.

(6) 2 Bla. R. 723. 3 Wils. 145.

(7) Strange, 836.

(8) 13 East, 439.

(9) 4 Taunt. 826.

(10) Smith v. Hill, 1 Wils. 134. Doe dem. Duroirs v. Jones. 4 T.R. 311.

(11) Perry v. Jackson, 4 T. R. 516.

CHAP. XVIII.

Remedies on General Insolvency, Letters of Licence, Deeds of Inspection, &c.

WE have already considered many of the most important points relating to the law of debtor and creditor; namely, how debts may be created (1), guaranteed (2), suspended, altered, or released (3); and in a slight degree how the fulfilment of obligations in general may be enforced by stoppage *in transitu* (4), lien (5), set off (6), and other remedies. The remedies we have considered are for the most part only applicable where the debtor is solvent, but refuses to discharge his obligation, or where he is not *generally* insolvent. We have now only to pursue our enquiries into the remedies of creditors, where the debtor is *generally* unable for a time to pay his creditors, or is absolutely a bankrupt or insolvent.

The proceedings in cases of *general insolvency* are of two descriptions, 1st, where time is to be given by the creditors to the debtor for the payment of the whole of his debts, or where the creditors accept a composition payable at once, or by instalments, in lieu of the whole of their debts, as in case of deeds of inspection, letters of licence, and deeds of composition; 2dly, where the debtor becomes bankrupt or an insolvent debtor. The term "*insolvency*" (derived from the Latin *insolvendo*) when used in an act of parliament, has been construed to signify an inability on the part of the debtor to pay with punctuality, and at the appointed days, the debts due from him. (7).

General insolvency.

When it is expected that a debtor will ultimately be able to pay the whole of his debts in full, but is unable immediately to discharge the same, it is a very frequent practice for the creditors to enter into an agreement to give him time for their payment. This practice is very beneficial in its effects to both parties. An

Of arrangements of composition between debtors and their creditors.

(1) Ante, 1. to 106.

(2) Ante, 317. to 339.

(3) Ante, 139. to 162.

(4) Ante, 340. to 353.

(5) Ante, 537. to 558.

(6) Ante, 669. to 679.

(7) 1 M. & S. 350. 353, 4.

honest debtor may thereby be enabled to pursue his trade for the benefit of his family and his creditors, between whom an equal course of payment is secured; the vexations of arrest and imprisonment, and the costs of hostile proceedings, are avoided; and his estate and effects are not wasted by the expences attending a commission of bankruptcy. It has been observed (1), that where a debtor's affairs are in a state of embarrassment, it is generally as advantageous to the creditors as to the debtor himself, that an agreement for a deed of composition, &c. should be made, by which he may be enabled to give up his attention to them without fear of molestation, as a concern, which by diligence and activity on the part of the trader might speedily become sufficient to satisfy every demand upon it, is frequently rendered desperate by the neglect, consequent on the perplexity of mind, which must necessarily result from the importunity of impatient creditors. It has on the other side been said, that compositions with creditors are private bankruptcies, with all the mischief and none of the advantages of a commission; that the old creditors are benefited, and the new ones defrauded (2). Under a composition with a dishonest debtor, this objection may be well founded, but not so with an honest one, and it is difficult to conceive why the old creditors, in the cases of bankruptcy as well as compositions, are not on the same footing with the new.

Of the different instruments, and methods of making these arrangements between debtor and creditor.

The manner in which the debtor thus obtains time from, or compounds with his creditors, must necessarily depend on the circumstances of each case. The instrument for this purpose is generally under *seal*; and where it is intended as a release or discharge at law of a specialty claim or debt, it is essential that it should be so (3); for to a contract under seal, an agreement not by deed by the plaintiff with other creditors to give time or accept a composition, cannot be pleaded at law as an answer to an action (4), though equity will sometimes relieve. (5)

Letters of licence.

When the debtor only wants time to pay his debts in full, and his creditors agree to give it without in the meantime controlling him in the conduct of his business, such agreement is usually effected by an instrument termed a *deed or letter*

(1) See Barton's Precedents, vol. 6. p. 7. n. 1.

(2) See 1 Rose, 281. 19 Ves. 97. S. C.

(3) See 7 Price, 604.

(4) Id. *ibid*.

(5) 16 Ves. j. 372.

of licence, by which the creditors simply give their debtor licence to trade or obtain his livelihood, or (as many instruments of this species describe it) to go abroad, &c. for a limited time, without their in anywise molesting him; and in this case he is left to carry on his business for the prescribed time, and upon terms varying according to the circumstances of the case, without control or inspection.

Where the creditors agree to give time, but require that the debtor's affairs shall be investigated, and his future business be superintended until the debts have been paid, the instrument is usually termed a *deed of inspection*. This instrument is usually entered into between the debtor of the first part, the trustees or inspectors of the second part, and the creditors of the third part; and by which the creditors covenant not to molest the debtor for an indefinite or definite period, but to give him licence to carry on his trade or profession for their benefit, his affairs, &c. being subject to the inspection of such trustees or inspectors, who are usually invested with powers to inspect books and vouchers, and generally regulate the trade. Deeds of inspection.

Independently of these instruments, agreements not under seal of the like import are sometimes used as preliminary stipulations. Where creditors are assembled to receive a proposition respecting the liquidation of the debts, upon their agreeing to the proposals they usually sign a memorandum to that effect, the terms of which will bind those who sign, at least in equity, as much as if the instrument had been under seal. (1) Preliminary agreements.

When it has been ascertained that the debtor will not be able, even with time given, to pay the whole of his debts, and the creditors are content to receive a lesser sum in satisfaction of the whole, an instrument is usually entered into termed a *deed of composition*, by which the creditors, upon the payment of such lesser sum at a time or times therein stipulated, agree to discharge the debtor from all further claim; and sometimes the creditors immediately release their debtor from all claims, upon his delivering up to them the whole or a particular part of his property. The instruments by which such arrangements and compositions are effected are sometimes termed *deeds of trust and deeds of assignment*. Deeds of composition.

(1) 1 Esp. Rep. 236. id. 131. Peake Rep. 235. 1 New. Rep. 124. 2 Smith, 426. 16 Ves. 372.

We will consider the law relating to this subject under the following division: viz. 1st, The requisites of an agreement for time, or composition deed, &c.; and, 2dly, The construction and effect of the instrument by which these arrangements are to be effected.

1st, Of the requisites in the case of a composition with creditors, or agreement by them to give time.

As in all other contracts, it is an essential requisite to create a valid and binding agreement by the creditors for the liquidation or temporary discharge of their debts, that there be, 1st, a sufficient ability in the parties to bind themselves by such agreements; 2d, that if the agreement be not under seal there be a sufficient consideration for entering into it, and that in all cases the agreement be *bonâ fide* entered into; and, 3d, that the parties assent to the agreement.

Who may be parties.

We have already considered who may be the parties to a contract, and our inquiries under that head will be here applicable. (1)

Of the consideration.

We have also considered (2) what will amount to a good and valid consideration to support a contract in general (2). Where there is an agreement not under seal between one creditor separately and the debtor, to give the latter time, or forgive him part of the debt, unless there be some new consideration to support it it will not be binding (3); and though the composition be paid, the creditor may still sue for the residue (4). But payment and acceptance of a part of a debt before the day it was due, or at a place where the whole debt was not payable, in satisfaction of the whole, is a good satisfaction (5); so the gift of a horse, or other property in specie, in satisfaction, is good (6). And where the debt is uncertain and unliquidated in its amount, and fairly disputable, payment of a lesser sum may be given in satisfaction (7). An agreement not under seal between a debtor and his creditor to accept a less sum, in satisfaction of a larger one, is binding on the creditor if the payment is guaranteed by a third person (8), or the debtor assign over his effects in trust to secure

(1) Ante, 11 to 63.

(2) Ante, 63, &c. see page 146.

(3) 3 Co. 118. 2 T. R. 24.
11 East, 390. 3 Camp. 126. 5

East, 230. 4 Mod. 88. Yelv. 10.

(4) 5 East, 230. 1 Smith, 415.

2 T. R. 26. Co. Lit. 212.

(5) Co. Lit. 212. b.

(6) Id. ib.

(7) 4 Mod. 88. Yelv. 10.

(8) 2 T. R. 26. Stra. 426.

11 East, 390.

the payment (1), or give a chose in possession for a chose in action (2). So if a creditor, by his undertaking to accept a composition, induce the debtor to part with his property to his creditors, or induce the other creditors to discharge the debtor, to enter into the composition deed, or deliver up securities to him, such creditor would be bound by such undertaking (3). Where *several* creditors, with the knowledge of each other, agree on the faith of each other's undertaking to give time to or accept a composition from a debtor, the agreement will be binding on every creditor who is a party to it (4), because the agreement by one party, at the instance or with the concurrence of another, to give time or accept less than the whole of his debt, is of itself a sufficient consideration. (5)

When the instrument by which the creditors agree to accept a composition or grant time is under seal, then the consideration for making it cannot be inquired into (6), provided the proceeding be *bonâ fide*, and obtained without fraud.

The creditors' *assent* to the instrument is essentially requisite, in order to render it binding on them. We have already considered the manner in which a party may express his assent to a contract (7). In agreements of this nature, the creditor may testify his assent thereto, either by express words or by implication. Where he expressly assents to the agreement, there needs no comment on it. It is not necessary that the creditors should actually sign the agreement or deed; a creditor who has not signed may be bound if by any act he has assented (8); though unless a creditor by deed execute the deed of composition, he may not be bound at law (9). As to what will be considered as an act in pursuance of the contents of the agreement, so as to bind a creditor, must necessarily depend upon the facts of each peculiar case. (10)

Of the parties
assent.

If there be a stipulation in a composition deed, that if all the creditors do not sign it by a fixed day the deed shall be void,

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| (1) 2 T. R. 24. 6 T. R. 263. | (7) See ante, 103. |
| (2) 3 Coke, 118. | (8) 15 Ves. 52. 16 Ves. 374. |
| (3) 2 Stark, 407. 2 M. & S. | 4 East, 372. 4 Camp. 233.; see |
| 120. 1 Esp. 236. 2 Camp. 384. | vide 6 T. R. 146. |
| (4) 3 Campb. 175. 2 M. & S. | (9) 7 Price, 604. |
| 122. 11 East, 390. 16 Ves. 374. | (10) 4 Camp. 235. Cooper, Ch. |
| (5) Id. <i>ibid</i> . | Rep. 105. 1 Rose, 313. 15 Ves. |
| (6) See ante, 63. | 52. |

if they do not execute it within that time the deed is void at law; but if all the creditors have acted under it, it will be sufficiently binding (1). And so, in equity, it will be good if executed by all the creditors after the day, though not till after the death of the debtor (2). Where before the execution of a composition deed it was agreed in the presence of the surety for the payment of the composition that it should be void unless all the creditors executed it, the surety at the same interview afterwards executed the deed in the ordinary way, without saying any thing at the time of execution, the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors: it was held that this was to be considered a delivery of the deed as an escrow; and that all the creditors not having executed it, the surety was not bound (3). Where a composition deed by which a tradesman assigned all his effects in trust for the benefit of his creditors, recited that he was indebted to his landlord in a specific sum for rent, to the crown in a certain sum for excise duties, and to S. & U. by name, as judgment creditors, in a sum of £400; and then recited that one of the trusts was to pay these specific demands, and all debts under £10 in full; then followed a proviso for avoiding the deed, "If any of the creditor or creditors whose respective debt shall amount to £100 or upwards, or any two creditors whose joint debts should amount to £150 or upwards, should not duly execute the said indenture within three calendar months from the date thereof, or in case any commission of bankrupt should in the meantime be awarded," &c.; and S. & U., whose judgment debt was to be paid in full, having refused to execute the deed upon request, and one of the general creditors who had executed brought an action to recover the amount of his demand against the debtor; it was held that the deed was a bar to the action, and that the execution by S. & U. was not necessary to give it validity. (4)

In most deeds of composition there is a recital that the debtor is indebted to the several creditors who sign the deed, and whose debts are set opposite their names in the schedule to the deed (5). It is as well here to remark, that the setting down

(1) Coop. Ch. Rep. 102. 3 Esp. 228. 1 Mad. 590. Buck. 164. 1 J. & W. 81.

(2) 1 Coop. 105. 102.

(3) 4 Barn. & Ald. 440.

(4) 1 Dowl. & R. 493.

(5) As some of the debts may

be disputable, it is advisable in general merely to recite generally that the insolvent is indebted to his several creditors, parties of the third part, omitting the words, "in the several sums set opposite to their names."

such debt opposite the creditor's name is not in general an essential requisite to his being a party to the deed; it is sufficient if the party be a creditor, and that the debtor, or party sought to be charged under the deed of composition, have notice of the amount of such creditor's claim before the commencement of an action on the deed (1). And again, under a deed containing the same recital, if the creditor sign the deed and leave a blank for the amount of his debt, without any qualification whatever, it extends, as it seems, to every debt for which the debtor is liable (2); but if he execute the composition deed without specifying the sum due, but execute it with a reservation for a future specification of the debt for which he consents to compound, the composition will not, as it seems, necessarily extend to all his demands. (3)

It has been said in argument, that a deed of composition of debts is an exception to the general rule, that one partner cannot bind the rest by deed; and that if copartners are creditors, and come in under the composition deed, it binds all if executed by one, and may be pleaded in bar to an action brought for the previous debt, either in conjunction with him who executed it, or by the others as surviving partners after his death (4). Where a scrivener on behalf of his client, but without his authority, agrees to compound a debt, this shall bind the scrivener, but not the client (5); but it would be otherwise if the client had given an authority, for then he would have been bound. (6)

As in all other contracts, the subject-matter of these arrangements between debtors and creditors must be legal (7). A condition in a deed of composition, that a publican shall continue to deal twelve years with his creditors in the articles of their respective trades, may be valid. (8)

Subject-matter.

Letters of licence, and deeds of inspection and composition, and other agreements of a similar nature, are generally construed

Of the construction, nature, and effect of these instruments.

(1) 2 Chitty's Reps. 564.

(2) 1 Barn. & Ald. 103. Stark, 198.

(3) 2 Stark, 198.

(4) 2 Swan, 540.

(5) 2 Vern. 127.

(6) 3 P. Wms. 277. As to what acts of an agent will bind the principal, see ante, 193. 201 to 210.

(7) See ante, 99 to 103.

(8) 8 Taunt. 529.

liberally, so as to give full effect to them (1); and though, as against the debtor, they will in some cases be construed strictly (2), yet equity will always assist a composition of debts, if obtained without fraud, and upon a fair representation. (3)

These agreements, in order to operate as a discharge of the original claim, or a suspension of the creditor's remedy to enforce it, must be of as high or a higher nature as the instrument or act by which such original claim is secured. Thus it is no answer to an action of covenant on a deed, that a bill of exchange was given in payment and satisfaction of the debt due under the deed (4). So a plea to an action of covenant, that the plaintiff agreed with defendant and his other creditors to execute a composition deed, was held bad (5). If a creditor agree to take a moiety in discharge of his debt, upon the express condition by another creditor, that he, taking the residue of the property, will also discharge the debtor, and a third person agree also to take a moiety, but without any communication with such other creditor, who delivers up to the debtor a warrant of attorney which had been given as a security for his debt, he is bound by the terms of the composition. (6)

The general rule is, that a personal thing or action once suspended is for ever extinct (7), unless the suspension arise by an act in law, and not by an act of the party (8). But this rule does not hold in all cases, and these agreements with debtors do not in general operate as a suspension or extinguishment of the original debt; and unless they contain a stipulation, that if the creditor sue the debtor within a specified time the agreement may be pleaded as a release, or that the original claim be forfeited, the debtor cannot plead it in bar as a release, but must resort to an action on the creditor's agreement not to sue, &c. (9); but if the agreement contains either of such stipulations, it

(1) See 1 P. Wms. 751. 727. 1 Vern. 210. 3 Atk. 583.

(2) *Id. ib.* 1 Equ. Abr. 28. Ambler, 332. 1 Chan. Cases, 110. 2 Atk. 527. 16 Ves. 372.

(3) 1 P. Wms. 751. 727.

(4) 3 East, 251. Com. Dig. tit. Accord, a. 2.; see 6 Co. 44. 1 Taunt. 428. 1 Wils. 86. 11 East, 390. 3 Camp. 175. 1 Esp. 236. 2 Camp. 383. 2 M. & S. 120.

(5) 7 Price, 604.; and see ante, 146. 148, 9.

(6) 2 Stark, 417. 2 M. & S. 120.

(7) Com. 124. Dyer, 140. a.; and cases there cited. Co. Lit. 292. b. Salk. 302. ante, 149.

(8) *Id. ibid.*

(9) Carthew, 63, 64. 2 Salk. 572. 1 Roll. Ab. 939. 11 Vin. Ab. 461. 21 Hen. 7. pl. 23 & 30. 2 Bulstr. 95. 290.

operates as a suspension of the debt, and is pleadable in discharge (1). And if the creditor covenants not to sue the debtor at all, this is an acquittance, and the covenant may be pleaded in discharge (2); though a covenant not to sue one of two joint and several obligors cannot be pleaded as a release by the other (3). A deed or letter of licence given by creditors, agreeing not to sue or molest the debtor within a particular time, there being no words in the defeazance to make the original claim forfeited, is no defence to an action commenced for the original claim founded on a specialty contract (4); though it would be otherwise if the deed or letter of licence contained words allowing it to be pleaded in bar to such fresh action, or stipulating that upon such action the original claim should be forfeited (5). And it has been held that a covenant in an indenture, (whereby a debtor assigned his effects to trustees for benefit of creditors), not to sue if trustees fairly accounted for effects, does not operate as a release of the creditor's debts, if the trustees refuse to account (6). And so an agreement between a debtor and his creditors, that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand (7). So where the creditors of an insolvent agreed by an instrument not under seal, that they would accept in full satisfaction of their debts 12s. in the pound payable by instalments, and would release him from all demands, it was held that this agreement did not operate as an extinguishment of the original debt, so as to prevent a creditor from retaining the benefit of securities, there being no stipulation to give them up (8). A condition not to sue a debtor within such a time under a penalty, does not ex-

(1) *Id.* It has been decided, that a covenant in a letter of licence not to sue the debtor for *seven years*, and that if the creditor did the debtor should be discharged and released of his debt, being a covenant not to sue within a particular time, is no release, and no more than a covenant not pleadable in discharge of an action for the original debt. Holt. 619. 1 Show. 331. Carth. 210. S. C.; but see 1 Show. 334. note. 1 T. R. 93.

(2) Amb. 123. Holt, 619. 1 Show. 47. 11 Vin. Ab. 461. 8 Term Rep. 168.

(3) 8 T. R. 168. 6 Taunt. 289. 1 Marsh. Rep. 603.

(4) Holt's Repts. 619. 1 Roll. Ab. 939.

(5) Carth. 630. 210.

(6) 2 Chitty's Rep. 541.; see 4 B. & A. 440. Comb. 123.

(7) 2 T. R. 24. 766. 6 T. R. 263. 5 East, 230. 11 East, 392. &c. 3 Camp.

(8) 1 Barn. & Ald. 1.; see 1 M. S. 304. 2 M. & S. 1.

tend to the executors of the obligor, unless they are named in the deed (1). We have already slightly considered how far sureties may be discharged by giving time to the principal debtor. (2)

Unless there is an express or implied stipulation at the time of entering into these arrangements, that the creditors shall deliver up the securities they hold, they are not bound to do so (3). And therefore, where one of the creditors who signed a composition deed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person, the money due on this bill having afterwards been paid by the acceptor, it was held that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt (4). Where a deed of trust is made for payment of debts, it shall extend only to debts contracted at the time of making the deed (5). If a creditor for goods sold is also the indorsee of a bill of exchange, which he has indorsed to a third person for valuable consideration, who at the time of the execution of a composition deed by the creditor is the holder of the bill, and the creditor sign the deed without specifying the amount of his debt, it seems that the composition extends only to the goods sold (6). But it would be otherwise if there was an express stipulation or reservation in the agreement, that all securities should be delivered up (7). And accordingly, where the creditors of a bankrupt entered into a composition deed to receive 8s. in the pound, in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and join in a petition to the chancellor to supersede the commission, and one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of 8s. in the pound on both debts, and then recovered the full value of some of the bills, it was held that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received. (7)

(1) 1 Show. 331. 9 Co. 92.
Noy, 5. Dyer, 65. Cro. Eliz. 398.
1 Roll. Rep. 68. Hob. 188.
1 Wils. 4.

(2) Ante, 326.

(3) 1 Barn. & Ald. 1. Ante, 326.

(4) 1 Vern. 28.

(5) 2 Stark. 195. Montague on
Compositions, 21.

(6) Id. 1 Bos. & P. 286.

(7) Id.

If the terms of the agreement to give time, or of the composition, are not strictly complied with by the debtor, the creditor is released from his obligation to accept it (1). Thus if a composition be made with a provision that the money is to be paid on a certain day, and it is not paid on the day, and the creditor thereupon sues for his whole debt, a court of equity will not relieve the debtor (2). And where a creditor for £1700 agreed with his debtor to take eleven shillings in the pound, to be paid by instalments, and the debtor after the first payment became a bankrupt, it was considered that the creditor might prove the whole £1700 under the commission (3). So where it was provided in a deed of composition, that in case of default of payment, or if any commission of bankrupt should issue before the whole of the composition should be paid, that then the covenants on the part of the creditors, whose debts should be so unsatisfied, should be null and void, and a commission issued after the whole instalment was due, but before it was paid, the creditors were held to be entitled to retain the first instalment, and prove under the commission for the residue of the original debt (4). And where a debtor agreed to assign all his estate in trust to pay debts, with a certain allowance to himself, and most of the creditors signed the agreement, the debtor afterwards embezzled some of the goods, and some of the creditors who had signed took out a commission of bankruptcy against him, it was held he was entitled to no relief in equity (5). But though an agreement for a composition generally is not binding on the creditor, unless strictly and absolutely fulfilled, yet a bond creditor, having concurred in a general resolution for a composition, to be secured by notes, will be restrained, under circumstances referring to the interest of other creditors, from issuing an execution obtained on his bond for more than the amount of the notes unpaid. (6)

Of the performance of the arrangement between the debtor and his creditors, and what will excuse or discharge the performance.

A creditor who becomes a party to these arrangements cannot abandon them and sue for his original debt, nor become a petitioning creditor under a commission of bankruptcy against the debtor (7); but in a case where a creditor, being ignorant that

(1) 2 M. & S. 120. 3 East, 252.
11 East, 390. 3 Camp. 175.

(2) 1 Vern. 210. 3 Atk. 583.
2 Atk. 528.

(3) 2 Atk. 527. 8 Ves. 86.

(4) 1 Rose, 281. 435.

(5) 7 Vin. Ab. 461.

(6) 16 Ves. 372.

(7) 2 T. R. 594. n. 4 East, 230.

an act of bankruptcy had been committed by his debtor, executed a composition deed for the amount of his debt, and received a dividend under it, it was held that he might notwithstanding become a petitioning creditor in respect of the original debt. (1)

If a creditor is induced to execute an agreement to compound his debts or give time to his debtor, through the fraud, misrepresentation, or fraudulent concealment of his debtor or other party acting for him, such agreement will not be binding on him, either at law or equity. We have already considered what fraud, misrepresentation, or concealment will avoid a contract. Where a man who is really solvent assumes the appearance of insolvency, so as to alarm his creditors and frighten them into an abatement and release of the debt, equity will relieve (2). And a creditor is not bound by a composition deed to which he is a party, if any misrepresentation has been practised to obtain his consent (3); and therefore if a creditor is induced to sign a composition, from a representation made to him by the debtor, that all the creditors will accede if he will compound, and this representation is false, as some of the creditors refuse to sign, the composition is void (4). If a debtor conceals, instead of discloses, that he has committed an act of bankruptcy, and prevails upon a creditor who is ignorant of such act of bankruptcy to execute a composition deed for the amount of his debt, and such creditor receives a dividend under it, yet he may become a petitioning creditor in respect of the original debt. (5)

Of contracts in fraud of creditors. Of fraudulent assignments of property.

The consideration for entering into all contracts must be good or valuable and *bonâ fide*, and not in fraud or collusion to deceive just and lawful creditors, which would vacate the contract, and subject such persons as put the same in use to forfeitures, and often to imprisonment. The legislature has by several acts protected the claims of *bonâ fide* creditors, and declared all contracts and gifts in fraud of such creditors to be void, and the courts of law and equity are always inclined to construe these acts liberally, for the benefit of creditors. (6)

(1) 5 M. & S. 161.

(2) 12 Mod. 558. 2 Ves. 602.

(3) 6 T. R. 263.

(4) Id.

(5) 5 M. & S. 161.

(6) Cowp. 434. 3 Rep. 82.
2 Atk. 205.

Thus, by the 13 Eliz. c. 5. sec. 2. (1), it is enacted, that "Every ^{Of fraudulent assignments of property.} feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any lease, rent, common or other profit or charge out of such lands, &c., by writing or otherwise, and every bond, suit, judgment, and execution to be had or made with the intent to defraud creditors or others of their actions, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, shall be deemed only as against that person, his heirs, successors, executors, administrators, and assigns, whose actions, &c., are or shall be any way disturbed, delayed, or defrauded, to be utterly void. All parties to such feigned or fraudulent feoffments, &c., and being privy and knowing of the same, which shall wittingly put in use, avow, or defend the same as true and done *bonâ fide*, and upon good consideration, or shall alien or assign any lands, &c., so conveyed to him, shall forfeit one year's value of such lands, &c., and the whole value of such goods, and so much money as is contained in such covinous bond, half to the king, and half to the party grieved, to be recovered in any court of record by action of debt, &c., or information, wherein no essoin, &c., shall be allowed, and shall also, on conviction, suffer one half year's imprisonment (2)." By the 4th section it is declared, that "All common recoveries hereafter to be made against tenant in tail or other tenant of the freehold, (the reversion or remainder, or the right thereof then being in other persons), shall, as touching such reversioners or remaindermen, and against their heirs, stand in full force notwithstanding this act. But this act does not make void any estate or conveyance, by reason whereof any person shall use any voucher in any writ of formedon thereafter to be depending; but such vouchers are as valid as if the act had not been made (3). And this act does not extend to any estate or interest in lands, &c., leases, rents, commons, profits, or goods thereafter to be had, conveyed, or assured, which estate or interest shall be on good consideration and *bonâ fide* lawfully conveyed or assured to any person or body corporate not having notice of such fraud or collusion. (4)

This statute extends to fraudulent assignments of personal property; but it seems matter of doubt how far surrenders of

(1) Confirmed by 14 Eliz. c. 11.
s. 1.; made perpetual by 29 Eliz.
c. 5. s. 2.

(2) Sec. 3.
(3) Sec. 5.
(4) Sec. 6.

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copyholds are within the statute, as they can scarcely have the effect of hindering, delaying, or defrauding creditors, since they cannot issue process to levy a debt upon a copyhold estate, and it has moreover been determined, that they do not constitute an act of bankruptcy. (1)

As it has been correctly observed (2), the object of the legislature was evidently to protect creditors (3) from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation; for as to those gifts, bargains, or conveyances which want even a good or meritorious consideration for their support, their being voluntary seems to have been always a sufficient ground to conclude that they were fraudulent; but though the statute protects the legal right of creditors against the fraud of their debtors, it anxiously excepts from such imputation the *bonâ fide* discharge of a moral duty. It therefore does not declare all *voluntary* conveyance, but all *fraudulent* conveyances to be void (4); and whether the conveyance be fraudulent or not is declared to depend on the consideration being good and *bonâ fide*. This leads to the inquiry, what shall be deemed a good consideration, and what is intended by requiring a conveyance for such consideration to be also *bonâ fide*. We have, indeed, already considered what is a good, fair, and valuable consideration for a contract in general (5), and it will perhaps be useful here to refer to those observations. We will now chiefly consider the circumstances which are regarded as badges of fraud. (6) It may be useful to observe, that this statute of Elizabeth much resembles that of the 21 Jac. 1. c. 18. s. 11. against the fraudulent disposition by a bankrupt of his property

(1) 1 Cox's Repts. 278. acc. Evans, Notes on this Statute, vol. 1. p. 392. Ellis 155.; sed vide Cowp. 705.

(2) See Fonblanque's Treatise on Equity, vol. 1. p. 271.

(3) The benefit of this statute is not confined to creditors, for the preamble speaks of deeds made to defraud creditors and others of their just actions, &c. forfeitures, &c. It has therefore been held, that the word "forfeiture" should be extended not only to forfeiture of an obligation, &c., or such like, but also to every thing

which shall by law be forfeited to the king or subject; and therefore if any man prevent a forfeiture for felony, or by outlawry makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are forfeited notwithstanding the gift. 3 Co. 82. a. & b. Newland on Cont. 389.

(4) 1 Ch. Ca. 99. 291. 1 Vent. 194. 1 Mod. 119. 1 Atk. 15. Cowp. 708.

(5) Ante, 63 to 99., &c.

(6) 2 Sch. & Lef. 492. 5 Ves. 48. 1 Wils. Ch. Rep. 86.

to defraud his creditors, and that the decisions on the latter act will in many cases be applicable; the words, however, of the latter act are much stronger, and convey a more extensive signification, and the decisions on that statute will not in all cases apply. (1)

Of fraudulent assignments of property.

A fraudulent assignment or disposition of property within the meaning of this statute is frequently a mere formal transfer, executed not to give the alienee the property, but only to induce a belief that it is vested in him, that he may hold it in trust for the debtor (2). The question in every case is, whether the act done is a *bonâ fide* transaction, or whether it is a trick or contrivance to defeat creditors. (3) This question of fraud must be decided by reference to the motives of the party making the deed or assignment (4).

A voluntary assignment or conveyance of property without a valuable consideration, by a party indebted at the time, would *primâ facie* amount to a fraud against creditors, though the assignment or conveyance be in consideration of blood, or of natural love or affection; for though a gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others, yet if it does militate against such rights, it is equally clear that it ought to be set aside. If therefore a man, being indebted, convey to the use of his wife or children, such conveyance would be within the statute, for though the consideration be good, yet it is not *bonâ fide*, that is, the circumstances of the grantor render it inconsistent with that good faith which is due to his creditors (5). And, as Lord Coke has said (6), when a man, being greatly indebted to sundry persons, makes a gift to a son or any of his blood, without consideration but only of nature, the law intends a trust between them. So where a husband after marriage, being indebted at the time, settled his estate upon his wife for a jointure, and then in strict settlement, and died, it was held that the settlement was fraudulent as against creditors (7). But where a settlement made

Of voluntary assignments of property, without a valuable consideration, to the assignor.

(1) 6 East, 257. 10 Ves. 139.

(2) 3 M. & S. 371.

(3) Cowp. 432. 6 East, 257.

(4) 8 T. R. 521.

(5) 1 Fonblanque, 271.

(6) 3 Co. 81. b.

(7) 1 Ves. 27.; and see 2 Ves. 11. 1 Atk. 15. Ambl. 121. As to a settlement after marriage, in consideration of a parol agreement

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by a father on his son and his wife is in consideration of a portion paid by the wife's father, though the husband's father was indebted at the time, and though the settlement was after marriage, it will not be fraudulent against creditors, being for a valuable consideration (1). So where a settlement is made by a husband on his wife, though it is after marriage, yet if it be in consideration of her father's securing the absolute payment of a portion to which before she was entitled only on a contingency, such a settlement is to be considered to be supported by a valuable consideration, and therefore will be good against creditors (1). So a settlement before marriage is good against every body, although it is in consideration of marriage only (2). So where the husband, after marriage, being indebted *bonâ fide*, conveyed an estate to trustees, to the separate use of his wife, it was held that the trustees having undertaken to indemnify the husband against the wife's debts, was sufficient to support the settlement, as made for a valuable consideration. (3)

To render a voluntary assignment or conveyance void, the debtor must be in insolvent circumstances, or indebted in debts of some magnitude at the time of granting it; a single debt is not sufficient, since every man may be indebted for the common bills of his house (4). And it is to be observed, that if the debtor be indebted at the time of making the conveyance, and the debt is secured by mortgage, it will be valid. (5)

If there be a voluntary assignment, conveyance, or gift of real estate, or chattel interest, or of personal property, by one not indebted at the time, though he afterwards becomes indebted, if that voluntary disposition was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that

before marriage, see 2 Cox, Rep. 235. ; sed. vide, also, 1 Eden's Reps. 62. and cases there referred to.

(1) Ambl. 121.

(2) 2 Bro. C.C. 90.

(3) 2 Bro. Rep. 90. Cowp. 434. 5 Ves. 384.

(4) 5 Ves. 384. 2 Atk. 520. Gibb. Rep. 37.

(5) 2 Bro. C.C. 90. 7 Vin. Ab. 72.

will make it void (1). This distinction is drawn from considerations too obvious to require illustration from cases: for if a man indebted were allowed to divest himself of his property in favour of his wife or child, his creditors would be defrauded; but if a man not indebted, and not meaning a fraud, could not make an effective settlement in favour of such objects, because by possibility he might afterwards become indebted, it would destroy those family provisions which are, under certain restrictions, a benefit to the public, as well as to the individual objects of them. (2)

Of fraudulent assignments of property.

The grantor of a voluntary assignment or conveyance being indebted at the time of granting it, is not the only badge of fraud, several other circumstances may exist as furnishing a strong presumption that the transaction is *malâ fide* (3). Thus, if the conveyance contain a power of revocation, or a power to mortgage, it will be considered as fraudulent against creditors (4), the grantor be allowed to continue in possession, the conveyance being absolute (5); or if the conveyance or gift be voluntary of the whole or greater part of the grantor's property, without consideration of blood or of natural love or affection, or for a consideration clearly inadequate, such conveyance or gift would be presumed to be fraudulent, for no man can voluntarily divest himself of all or most of what he has, without being aware that future creditors will probably suffer by it (6); or if a person makes a settlement, taking back an annuity to the full value of the property, this would *primâ facie* amount to a fraud. (7)

If the consideration for the assignment or conveyance of property be valuable, and the transaction be *bonâ fide*, it will in general be valid. There may, however, be cases where, though a party has given a fair and full price for goods, and where possession is actually changed, yet if done for the purpose of defeat-

Of dispositions of property when there is an apparent or actual valuable consideration.

(1) 1 Wilson, Ch. Rep. 88. 106. 12 Ves. 155. 1 Cox. Rep. 2 Ves. 11. 2 Atk. 481. Cowp. 288.
 711. 1 Atk. 13. 13 Ves. 155. (3) See 3 Coke, 82.
 2 Bro. C. C. 90.; sed vide Forrest, (4) 2 Vern. 510.
 64. 2 Vern. 261. 1 Cox, 280. (5) 2 Bulstr. 218.; sed vid. 17 Ves. 263.
 semb. cont.; see also Mr. Fonblanque's annotations, which agree with the above text. (6) See 1 Fonb. 273. 1 Cox, 278. 12 Ves. 136.
 (2) 1 Fonblanque, 272. 1 Atk. (7) 1 Atk. 17.
 94. 1 Mad. Rep. 414. 1 Swan.

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ing creditors, the transaction will be deemed fraudulent and void (1). The question in all cases is, whether the transaction be *bonâ fide*. (2).

In general there is no objection at law against a debtor, unless prohibited by the bankrupt laws, or other peculiar circumstances, from whatever motive, preferring by assignment or payment one *bonâ fide* creditor or particular creditors, if he does so in payment of his or their just demands, and not as a mere cloak to secure the property to himself (3); and what he may do directly may be done through the intervention of a trustee (4). Thus an assignment (5) or a warrant of attorney to confess a judgment, given to a trustee for an equal distribution of the party's estate among all his creditors, is valid if *bonâ fide*, though the demand of a particular creditor who is suing him may be thereby defeated, except for a proportionable part (6). So a warrant of attorney to confess judgment given by a debtor to one of his creditors, as a security for his debt, and in order to defeat the pending execution of another creditor, was held valid (7). Where a debtor was sued by his creditor, and pending the suit executed an assignment of his effects to trustees, who took possession for the benefit of all his creditors, it was held the assignment was good, though the fact of the assignment was unknown to, and therefore unacquiesced in by any of the creditors at the time, the act itself being laudable, that determined its nature, and the motive was immaterial (8). Where A. by deed assigned all his effects at W. to trustees for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years or sooner, if A. should direct and apply the proceeds of the sale in discharge of the debts of such creditors who covenanted that A. might continue at home or abroad, and that they would not molest him for two years from the date of the deed, it was held that such assignment was valid, and not within the stat. 13 Eliz. c. 5., and that the property was thereby protected against a judgment creditor who had sued out execution

(1) Cowp. 434. 5 T. R. 238. see 1 M. & S. 395. 408. 5 Taunt. 1 East, 51, 2. 668.

(2) Cowp. 432. 6 East, 257.

(3) 5 T. R. 235. 420.; where it is said, that the above rule only applies where the debtor does not exhaust his whole estate. As to the right of executors in this respect,

(4) 8 T. R. 521.

(5) 3 M. & S. 371.

(6) 4 East, 1.

(7) 5 T. R. 235.

(8) 3 M. & S. 371.; see 5 T. R. 530.

against A. after the deed was executed (1). But a conveyance in trust for payment of the debts of the party making it for the benefit of some particular creditor, without other circumstances, such as the debtors giving up possession, the creditors being a party to the conveyance, or his having notice of it, or his entering into an agreement for forbearance, or to release his debt, will under circumstances be considered as invalid. (2)

Of fraudulent assignments of property.

The vendor or donor of goods under an absolute bill of sale or assignment of property, continuing in possession, is generally considered as a badge of fraud; for if a man sell or assign goods absolutely and still continue in possession as visible owner of them, such disposition necessarily carries with it an impression that all is not fair. The decisions on this point bear a great resemblance, and are in some degree governed by those under the 21 Jac. 1. c. 19., against assignments by bankrupts in fraud of their creditors. In cases of this nature, the notoriety of the change of property is the question on which the validity or invalidity of the transaction depends (3). Therefore, if in general an assignment be made of household furniture, and the assignor continue in possession, it is not protected against an execution at the suit of one of his creditors, unless the assignment was notorious (4). Where one being indebted to two persons, pending an action against him by one of them, made a general deed of gift of all his goods, &c. to the other in satisfaction of his debt, and notwithstanding that continued in possession of the goods, that circumstance was considered as a sign of fraud, and the gift was held to be fraudulent within the statute (5). And where a debtor, having made an absolute bill of sale of all his effects in his house, under an agreement at the time (but which did not form part of his bill of sale) that the creditor, if the debt was not paid within fourteen days, might enter upon and sell the effects, con-

Continuing in possession, when a badge of fraud.

(1) 5 Moore, 19.

(2) Ch. Ca. 149. 2 Vern. 510. Roberts on Fraud. Conv. 431. 1 Ch. Rep. 33.; vid. 3 M. & S. 371.

(3) 1 Gow. 34, 5.

(4) 1 Gow. 33.

(5) 3 Coke, 81. a. The above case was considered to have several other signs and marks of fraud: 1st, Because the gift was general without the exception of his ap-

parcel or any thing of necessity; 2nd, It was made in secret; 3rd, It was made pending the suit; 4th, Here was a trust between the parties, for the donor possessed all, and used them as his proper goods; and 5thly, That the deed contained that gift was made honestly, truly, and bona fide et clausula incon-sueta semper inducunt suspicio-nem. Newland on Cont. 371. note.

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tinued in possession, delivering only a corkscrew to the vendee till his (the vendor's) death, which happened before the expiration of fourteen days, the bill of sale was considered as fraudulent against a creditor whose debts were existing at the time; the court being of opinion, **that if** there is nothing but the absolute conveyance without the possession, that in point of law is fraudulent (1). So an assignment of furniture, &c. by a debtor to some of his creditors, in satisfaction of their debts, retaining possession under a demise at a rent, and afterwards taking a re-assignment from some, on payment of their debts with interest, would be void as against other creditors (2). And a conveyance of chattels, unaccompanied with the possession, is void, although in the same instrument be contained a valid mortgage of leasehold buildings, in which the chattels are situated (3). So likewise if a man convey his land absolutely, and yet is allowed to continue in possession as its absolute unqualified owner, this will be proof that the conveyance was fraudulent. Thus, if a man mortgage his land, and yet continues in possession, no disseisin is thereby created; if it was an absolute conveyance, and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent (4). So where a man conveys his lands to pay his debts, and yet retains the conveyance in his possession, this will *prima facie* be considered to be a mark of fraud; as it leaves him at option to set up the conveyance or not, as it suits his purpose (5). So if a creditor under an execution suffer the goods or property to remain in the hands of the debtor, or does not levy for a long time, or quits the property without leaving any party in possession, this will not bar another creditor's right to the goods. (6)

There are, however, cases where, although the vendor or assignor of property has continued in possession, the bill of sale or assignment has not been held fraudulent; as where the want of immediate possession be consistent with the deed or contract, and the change of the property be *bonâ fide* and notorious (7):

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| (1) 2 T. R. 587. 594. note. | in Chan. 286. 1 Ves. 245. 456. |
| (2) 19 Ves. 166. | 3 Taunt. 400. 1 Wils. 44. 1 H. |
| (3) 5 Taunt. 212. | Bla. 543. Peake, C. N. P. 65. |
| (4) Per Lord Coke. 2 Bulst. | 3 M. & S. 375. 1 M. & S. 711. |
| 226. 2 Vern. 261. 2 Atk. 477. | 4 East, 323. |
| 1 Atk. 13. & 16. | (7) 2 Term. Rep. 587. 595. |
| (5) 2 Vern. 510. | 1 Atk. 164. Roberts on Fraudulent |
| (6) See Tidd, 7 ed. 1021. Prec. | Conveyances, 558, 9. |

as where a husband before marriage conveyed to trustees all his household goods particularized by a schedule annexed to the settlement, to the use of himself for life, to his wife for life, remainder to the first and other sons of the marriage in strict settlement; the possession of the husband was held not fraudulent against a creditor whose debt existed at the time of the settlement, because it was in pursuance and in execution of the trust (1). Upon the same principle, if a wife on her marriage assigns all her personal property, consisting amongst other things of cows, and the increase and produce thereof, to trustees, upon trust to permit her to enjoy the same without her husband's intermeddling therewith, this property is not afterwards liable to be taken in execution for the husband's debts, upon the ground of the deed being fraudulent, for the possession is consistent with the deed; and as to the produce, it is the same as if the wife had paid the money over to the trustees, and they had bought other cows, for she acted as their agent (2); and it is not necessary, in order to prevent such a settlement from being considered fraudulent, that there should be an annexed schedule of the goods assigned by it (3); for as such a schedule would be known only to the parties interested in the settlement, it conveys no information to the rest of the world, and therefore is immaterial. It seems likewise, that an assignment of goods by the husband in trust for his wife, though after marriage, would not, if made for a valuable and adequate consideration, moving from the wife, be considered fraudulent against creditors (except in case of bankruptcy), on the mere ground of the husband's continuing in possession, for considering the relationship between them, his possession may be said to be consistent with the deed (4). If that fact however be connected with other circumstances, as if the consideration be grossly inadequate (5), or the wife permits third persons to treat the property in question as the husband's (6), it may afford evidence that the assignment was made in fraud of creditors.

Of fraudulent assignments of property.

So the presumption of fraud attaching upon the continued possession of the vendor is repelled, not only where the modified interest of the vendor under the deed makes it consistent with the deed, but likewise where such possession necessarily arises

(1) Cowp. 432. 435. note.

(4) 10 Ves. 150.

(2) 3 T. R. 620. note. Newl.

(5) 6 East, 257.

on Cont. 373.

(6) 10 Ves. 151.

(3) 3 T. R. 618.

Of fraudulent assignments of property.

out of the nature of the transaction between the parties, they having in view an honest purpose (1). As where the supercargo of a ship made a bill of sale of the goods which he had on board the ship which was going on the voyage, and of the produce and advantage which should be made thereof, as a security for the repayment of money lent by the vendee, it was held in a suit in equity between the vendee and a creditor of the vendor, by judgment obtained prior to the bill of sale, that the keeping possession of the goods after the sale was not fraudulent, as the trust of those goods appeared upon the very face of the bill of sale, the vendor being trusted by the vendee to negotiate and sell them for his advantage (2). So where a donee lends his donor money to buy goods, and at the same time takes a bill of sale for securing the money, the donor's continuance in possession will not be fraudulent (3). And so, as we have before seen, where a debtor assigned his property to trustees for the benefit of certain creditors, who were not to take possession till the expiration of two years, but then absolutely, the assignment was held good (4). But the circumstance of a deed or assignment, providing that the assignor may remain in possession, will not in all cases repel the presumption of fraud. Thus, if a debtor make an assignment of his goods, with condition that possession shall not be taken till forfeited, the assignment will nevertheless be considered fraudulent; for here the vendor neither conveys a modified interest to the vendee, nor is it made for a purpose which, as in some of the preceding cases, entitled or required him to continue in possession. The introduction of such a condition will no more make the vendor's possession consistent with the deed than a clause inserted in an absolute bill of sale, that the vendor shall remain in possession, would make such possession consistent with the deed: the clause in each case would raise a suspicion of fraud (5). In considering the question in relation to creditors, where the debtor continues in possession of goods mortgaged, it has been said, that this was fraudulent at common law, and the 13 Eliz. provides against it, that it shall be void; there is no distinction whether the sale be absolute or conditional; courts of equity and juries are to consider upon

(1) Newland, 374.

(2) 2 Atk. 599.

(3) Bull. N.P. 258. 1 Raym. 286.

(4) 5 Moore, 19. Ante, 704.

(5) Newland, 376.

the whole evidence, whether the conveyance was made with a view to defraud or not. (1)

Of fraudulent assignments of property.

A *bonâ fide* transaction will not be affected with the charge of fraud because an interval elapses between the execution of the deed of assignment and the taking possession under it, unless other rights or interests have intervened. Thus, where goods lying on a wharf were purchased, and an order was given for delivery, but no transfer was made until six months afterwards, when possession was taken, and the vendor a few days after became bankrupt, the title of the vendee was preferred. (2)

It frequently happens that the defendant under an execution is suffered to remain as the apparent owner of the goods; such circumstance, as before observed, will in general amount to a presumption of fraud (3); which, however, may be repelled. Thus, where a creditor took the goods of a defendant in execution upon a judgment confessed on a warrant of attorney, and bought them by public auction, and took a bill of sale from the sheriff for a valuable consideration, after which he let the goods to the former owner for a rent which was actually paid, it was held that the creditor had a title which could not be impeached as fraudulent by other creditors having executions against the same defendant (4). Where the goods of A. were taken in execution, and purchased at a public auction by B., who suffered A. to continue in possession, in order that he might carry on his business, and A. afterwards executed a bill of sale to C., it was held that B. was entitled to them as against C. (5). But where the goods of a trader were taken in execution by the creditor, who afterwards suffered the debtor to remain in possession, and he became a bankrupt, it was held that he was reputed owner under the statute of James, and the assignees were entitled to the property (6). Where B. lent A. money to buy the goods, and took an assignment of them as a security for his debt, though A. remained in possession it was held not to be fraudulent; but if the assignment had been made to any other creditor, the retaining possession would have

(1) 1 Atk. 167.

1 Gow. 35. n.

(2) 15 East, 21.

(5) 2 Bos. & P. 59.

(3) Ante, 705. Tidd. 7 ed.

(6) 1 Bos. & P. 82; sed vide

(4) 4 Taunt. 823. 4 Camp.

1 Ld. Raym. 724.

363. 1 Stark. 367. 1 Moore, 189.

Of fraudulent assignments of property.

made the assignment fraudulent as to other creditors (1). Where the property and goods of A. being in possession of the sheriff under a writ of *fiery facias*, he executed a deed of assignment to B. for a valuable consideration, on which the execution was withdrawn; B. superintended the management of the property, but allowed A. to continue in possession; and the same property was seized under a subsequent execution at the suit of C.; and it was held that such property was protected by the assignment to B., though A. had continued in the visible possession. (2)

Where the chattel is not capable of an actual delivery to the true owner, the delivery of a muniment or other article, if *bond fide*, is a sufficient delivery to prevent the sale or assignment being void within this statute, as in the case of an assignment of goods at sea, with the delivery of the bills of lading, and policies of insurance and other documents (3); and in the case of a mortgage of a ship at sea, the delivery of the grand bill of sale is sufficient (4). Under a *bond fide* sale of goods, the delivery of the key of the warehouse in which the goods are contained is sufficient (5). Where a canal company had advanced money to their engineer, with which he procured the goods in question, which were materials of bulk, and deposited them on the banks of their canal for the purpose of being used, and afterwards executed a bill of sale of them to the company, delivering a half-penny in the name of the possession of the materials, it was held that this deed was not fraudulent against his creditors, for no other possession could have been given: before the bill of sale was executed the goods were apparently in the possession of the company, because they were lying on their banks; the vendor had no possession of the goods, otherwise than because he had the property in them; but when he transferred that property to the company, the law referred the possession to the company who had the property, and in whom the possession apparently was before. (6)

A bill of sale also, unaccompanied by possession, is valid against a creditor who is privy and assenting thereto (7); and though no possession be given, a presumption that the sale is

(1) 1 Lord Raym. 280. 3 Co. Rep. 83.

(2) 1 Moore, 189.

(3) 1 Atk. 159. 153. 2 Ves. 272.

(4) 2 T. R. 462.

(5) 7 T. R. 67.

(6) 7 T. R. 67.

(7) 1 Taunt. 381. 19 Ves. 166.

bona fide may arise from the fluctuating state of the market. As where A., a farmer, executed a bill of sale of all his property absolutely to B., for a debt of £600., B. put his son into possession, A. continuing to manage the farm; a short time after execution was issued against the stock at the suit of C. against A.; after satisfying the execution it was questionable whether enough remained to cover the debt due to B.; it was held that the jury, allowing for the fluctuation in the market, were warranted in finding that the goods at the time of executing the bill of sale were not worth more than £600.; and that therefore it was made *bona fide*, and that A. was entitled to recover to the amount of £600 against the sheriff. (1)

Of fraudulent assignments of property.

Those transactions or dispositions of property which are avoided by the statute of Elizabeth are void, as well against those creditors whose debts were contracted subsequently to such deeds, as against those creditors whose debts were in existence at the execution of the deeds (2), and the subject of such fraudulent disposition is thrown into assets, and all the subsequent creditors are let in. (3)

No person can take advantage of this statute, but the party immediately injured by the fraudulent assignment. Where A. made a fraudulent gift of his goods to B., and died, and B. brought an action against A.'s administrator for the goods, the court held that the administrator could not plead the statute, or maintain the possession of the goods, even to satisfy the creditors, but the creditors might charge the vendee as executor *de son tort*. (4)

Besides this statute of Elizabeth, there are others protecting creditors. Thus, for the relief of creditors against fraudulent deeds made by debtors, the statute 2 Ric. 2. s. 2. c. 3. enacts, that where debtors make feigned feoffments of their lands and goods, and after withdraw themselves, and flee into privileged places of holy church, and take the profit of their said lands and goods, the creditors, after they have brought their writs of debt, and a *capias* awarded, and the sheriff return that he hath not taken such persons, because of places privileged,

(1) 2 Marsh. 427. 7 Taunt. 149.

(3) 12 Ves. 155. 136.

(2) 2 Atk. 601. 1 Ch. Rep. 69. 2 Vern. 261.

(4) Cro. Jac. 270. 2 T. R. 587.

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then another writ shall go to the sheriff to make proclamation at the gate of such privileged place five times, once in every week, that the person comprised therein be before H. M's. justices to answer the plaintiff; and on return of proclamation made, and such person comes not, judgment shall be given against him, and thereon execution shall be made of their lands and goods, as well those given by collusion, as of any other after such collusion found, but no man shall be barred his suit against such debtor at common law.

By 3 W. & M. c. 14. (1), passed for the relief of creditors against fraudulent devises, it is declared, that all wills and testaments, limitations, dispositions, or appointments, concerning any manors, messuages, lands, tenements, or hereditaments, or of any rent, profit, term or charge thereout, whereof any person at his decease shall be seised in fee-simple in possession, reversion, or remainder, or have power to dispose of by will, shall be deemed (only as against creditors by bond or specialty in which the heirs are bound, their heirs, executors, administrators, and assigns) to be fraudulent and absolutely void (2). Every such creditor may maintain his action of debt on his bond and specialty against the heir at law of such obligor, and such devisees jointly, and such devisee, shall be liable for false plea pleaded, in like manner as any heir should have been for false plea pleaded, or for not confessing the lands, &c. to be descended to him (3). Provided, that all limitations or appointments, devises, or dispositions of any manors, &c. as in s. 2., for the payment of any just debt, or any portion for any child other than the heir at law, according to any marriage contract in writing *bond, fide* made before such marriage, shall be of full force, and such manors, &c. shall be holden by such person, his heirs, executors, &c. for whom such limitations, &c. was made, and his trustees, and their heirs, executors, &c. for the estate so limited, &c. until such debt or portion is raised (4). Where any heir at law is liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same before action brought, or process sued out against him, he shall be answerable by action of debt, for such debt, to the value of the land so sold, &c.; in which cases all creditors shall be preferred, as in actions against executors and administrators;

(1) Made perpetual, by 6 & 7 W. & M. c. 14. s. 2.
(2) Sec. 2.

(3) Sec. 3.
(4) Sec. 4.

and such execution shall be taken out on any judgments so obtained against such heir to the value of such land, as if the same were his own proper debts, saving that the lands, &c. *bond fide* aliened before action brought, shall not be liable to such execution (1). Where any action of debt on specialty is brought against any heir, he may plead *riens per descent* at the time of the original writ brought, or bill filed against him, and the plaintiff may reply, that he had lands, tenements, and hereditaments from his ancestor before the original writ brought or bill filed; and if on issue joined thereon it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended, and thereupon judgment shall be given, and execution awarded, as directed in section 5.; but if judgment is given against such heir by confession of the action without confessing the assets descended, or on demurrer, or *nihil dicit*, it shall be for the debt and damages, without any writ to inquire of the lands, &c. so descended (2). All devisees made liable by this act shall be liable in the same manner as the heir at law by force of this act is, notwithstanding the lands, &c. to them devised are aliened before action brought. (3) Further provisions in favor of simple contract creditors were introduced by the 47 Geo. 3. sess. 2. c. 74., subjecting the real property of a trader to the payment of such debts.

Of fraudulent assignments of property.

We will next consider that class of contracts in fraud of those creditors who with the creditors in general have been induced to consent to take a proportion only of their debts, or who have consented to receive a payment of them by instalments, or to wait for any particular time, or generally for payment.

Of contracts in fraud of a deed of composition, or other deeds or arrangements between a debtor and creditors generally.

In general, as we have seen (4), a debtor may prefer one creditor to another; but where one creditor has agreed to observe a general arrangement between the debtor and his creditors for the liquidation of their debts in equal proportions, he cannot obtain from the debtor or any other person, without the privity or consent of the other creditors, a security for the payment of his debt prior to the payment of the other creditors; or in the case of a deed or instrument of composition of the residue of the debt, or of the

(1) 3 W. & M. c. 11. s. 5.

(2) Sec. 6.

(3) S. 7. As to the construction

of this act, see Bac. Ab. Heir, and Tidd, 7 ed. 946, 7.

(4) 5 T. R. 424.

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instalments by which it is to be discharged, nor can he in any other respect be favored to the detriment of the other creditors; any contract entered into with a view to give any such preference will be void, and cannot be enforced by any party thereto (1). Therefore, where a tradesman failing compounded with his creditors, but made an underhand agreement with some of his creditors to pay them the whole; this was considered a fraud on the other creditors, and void, and a court of equity would not enforce it (2). The agreement is void, if it be only to continue a greater security which the creditor held before the composition was in contemplation (3). Where the defendants assigned over all the effects in trust to pay 11s. in the pound to the creditors, to which they all consented, and signed the deed, except the plaintiffs, who, as their demands accrued just before the failure, refused to sign the deeds, &c. unless the defendant gave them a note for the remaining 9s. in the pound; they accordingly gave them the note in question to that amount, on which the action was brought; and Lord Kenyon said, that the foundation of his opinion was, that the temptation to give this note was a fraud on the creditors, who were parties to the contract on which their debts were to be cancelled in consideration of receiving a composition; that the note preceded the execution of the deed; that all the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed; then the plaintiffs in fraud of that engagement entered into a contract with the defendants which prevented their being put in that situation which was the inducement to the other creditors to sign the deed and to relinquish a part of their demands; and the court were of opinion that the plaintiffs were not entitled to recover (4). And the rule was considered to be the same where (5) the deed of composition provided that the shares of those creditors who did not execute it by a certain day should be paid to the insolvent, and the creditors (the plaintiffs) who obtained the underhand agreement did not execute the deed till after that day, a few of the creditors having executed it after them, for the circumstance of the plaintiff's not signing it till after the day rather added to than dimi-

(1) 1 Atk. 352. 2 T. R. 763.
4 East, 372.

(2) 2 Vern. 72.

(3) 15 Vesey, 59. 4 East. 372.

(4) 2 T. R. 763. 3 T. R. 551.

(5) 4 T. R. 166. 3 Anst. 910.

nished the fraud, for that was not apparent on the deed itself, and it was done with a view of signifying to the other creditors that they had come in under the deed. If a firm, being embarrassed, state the circumstance to one of their principal creditors, to whom they are indebted in a sum not exceeding £2,300 for bills which he has discounted for them, and in a further sum for goods, exceeding in the whole £5,000, and the creditor examine their accounts, and a deed is proposed and prepared for assigning their effects to trustees, in trust to divide equally amongst all the creditors who should come into the arrangement, and the creditor is willing to accede to this arrangement with respect to that part of his debt which is due for goods sold, and to come in *pari passu* with the other creditors for that demand, but refuse to accede to it for that part which is due for money advanced, and threaten that he will not execute the deed unless the latter part of his debt is secured to him entire by the delivery of bills to that amount, and this being agreed to, he goes to Lancashire, where most of the creditors reside, and states that he has examined the accounts and funds of the debtors, and is satisfied, and he is very active in promoting the execution of this deed, which bears date on the 20th of July, and contains a proviso for making it void in case all the creditors do not execute it by a certain day therein named, and if after he has executed this deed the debtors give up to him bills to the amount of £1,000 between the 4th and the 14th of August, (it being evident that the time for the creditors to sign would expire before all their signatures could be obtained), and the creditor cause another deed of trust to be prepared, bearing date the 2d of September, and enlarging the time for the creditors to accede to it, into which, at the creditor's suggestion, is introduced a clause confirming to all the creditors the benefit of all securities which they should hold at the time of their respective execution of the deed, and he refuse to execute this deed until he had on the 8th of September received the residue of the bills in question, and all these bills are included in the account of stock which was taken in order to be laid before the creditors as the statement of the funds to which they are to look for payment of their respective dividends, which are to be made by instalments, at four, eight, twelve, sixteen, twenty, and twenty-four months date from the first of August, and the whole of the bills are clearly given as the consideration for executing the second agreement, it seems that he

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cannot hold the bills so obtained (1). If a creditor promise his debtor, that if his debt is secured he will obtain the consent of all his other creditors to take a composition of 5s. in the pound, and he accordingly obtain a note signed by the debtor and a surety, and it is agreed between the debtor and the creditor that the transaction shall be concealed from the other creditors, and the creditor after he had obtained the security call on some of the creditors, and, concealing the transaction respecting his security, he endeavours in vain to induce them to enter into the composition, he cannot recover upon the note against the surety (2). If a debtor assign his effects in trust to pay a composition, and one of the creditors refuse to sign the deed, or to take any composition, unless the debtor will give a note for the remainder of the debt, and such note is accordingly given, and the debtor subsequently promise to pay it, such subsequent promise is not valid (3). But if an insolvent, after becoming free from his engagements, voluntarily give security for a former demand, such security is valid (4). Creditors, as we have seen (5), are in general as much bound in equity by acting under a composition as if they had signed the deed; therefore, where upon a composition some creditors entered into a private agreement for additional security, though not for more than the amount of the composition, it was held void, for it was a fraud both on the debtor and the other creditors. (6)

If the circumstance of a separate agreement being made between the debtor and a particular set of his creditors, securing to them the payment of the residue of their debts, be known to the rest of the creditors, the transaction then will not be fraudulent; but if the general creditors did not know that transaction, and did not mean that the deed should operate one way as to them and another way as to the other creditors, the policy of the law will reach the transaction, whatever the intention of the debtor might be, unless there was a distinct undertaking, which Lord Eldon thought there might be, that no question upon the policy of the law could ever arise, which would have bound him so that he should not say that the other creditors did not know the

(1) 5 Taunt. 109.

(2) 1 Brod. & Bing. 448.

(3) 2 Term Rep. 763.

(4) 2 T. R. 765.

(5) Ante, 688, &c.

(6) 15 Ves. 52. 4 East, 372.
con. 6 T. R. 146.

transaction, and had not such intention (1). If a debtor make a composition with his creditors, and secure the deficiency by a bond to one creditor, and it is part of the transaction that this dealing shall not be kept a secret, but shall be communicated to the other creditors, and they do not object, the bond has been held good (2); but those who contend that the agreement is known to all the creditors are bound to prove it (3). A recital in the composition deed seems to be the best evidence, but parol evidence will suffice (4). The sureties also must consent, or they will be discharged (5). It is not sufficient for the creditor to order the solicitor of the debtor, and of the creditors to notify that the creditor will not sign unless he has further security, if the solicitor neglect to give such notice. (6)

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If it is not expressly or impliedly stipulated or understood between the creditors, that the securities which have been given by the debtor shall be delivered up or be included in the arrangement, a creditor may retain them, and they may frequently be enforced without being considered as a fraud on the rest of the creditors (7). Thus, as we have before seen, where the creditors of an insolvent agreed by an instrument not under seal, that they would accept in full satisfaction of their debts 12s. in the pound, payable by instalments, and would release him from all demands, one of the creditors who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person, the money due on this bill having been afterwards paid by the acceptor, it was holden that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt (8). It has been ruled at nisi prius, that the maker of a promissory note for the accommodation of the payee is liable to an indorsee, with notice that it is an accommodation note, although before the note is due the indorsee accede to a composition with the payee, in which he covenants not to sue or

(1) 6 Vesey, 300. & 308. Mont. Deb. & Cre. 24. 3 T. R. 13 Ves. 586. 552.

(2) 13 Ves. 586.

(3) 15 Ves. 57.

(4) 15 Ves. 57.

(5) 1 P. Wms. 768. 1 Anstr. 1 Bos. & P. 286. 202. Expte Crow, March 1810.

(6) Expte Crow. Mont. Deb. & Cred. 25.

(7) See ante; 1 B. & A. 1.

(8) 1 B. & A. 1.

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otherwise molest the payee for ninety-nine years, and afterwards receives a dividend from the payee's estate (1). But if a creditor having securities accept a composition upon the whole debt, and stipulate to give up and release his claim upon such securities, he is not entitled to the proceeds of the securities, whether they are for a valuable consideration given by the debtor to the surety, or solely for the accommodation of the debtor. (2). And if a creditor hold an acceptance as a security for his debt, and agree with the creditors of his original debtor to accept a composition, with sureties for the due payment of the composition, but the creditor do not inform all the creditors, or such sureties, that he insists upon his right to the acceptance, such creditor cannot enforce the acceptance (3). If a creditor who has goods pledged with him execute a deed of composition, it is his duty to state the fact to the creditors. (4)

If creditors are induced to accede to a composition in consequence of a misrepresentation by a creditor in concealing the whole amount of his debt, it seems that such creditor cannot afterwards recover the difference between his whole debt and the sum which he claimed to be due (5); and it is said to have been ruled at *nisi prius*, that the creditor cannot at law recover such difference, although the debt afterwards demanded is upon a bill of exchange which was not due at the time of the composition (6). If a creditor suppress the amount of his debt at a proposal for an arrangement with another creditor, and the proposed arrangement is not adopted, the creditor is not precluded from enforcing it as against such other creditor with whom the arrangement was proposed. (7)

It has been doubted (8) whether, if a creditor at the request of his debtor represents to the other creditors, who are about to execute a deed of composition, that the amount of his debt is less than it really is, and receives a security from his debtor for the payment of a dividend equal to what he would have been en-

(1) 5 Esp. 178.

(2) 1 Bos. & Pul. 287. 6 Ves.
300. *Exparte Crow*. Mont. Deb.
& Cred. 23.

(3) *Exparte Crow*. Mont. Deb.
& Cred. 23.

(4) 5 Price, 602.

(5) 1 Anstr. 202. 1 Esp. Rep.

132. 3 Ves. jun. 456.

(6) 1 Esp. Rep. 132.

(7) 1 Rose, 138.

(8) 3 Ves. 456.; *sed vide* 1
Anst. 202. 1 Atk. 106.

titled to if he had specified the full amount of his debt, such transaction would be fraudulent against the rest of the creditors, so as to prevent such creditor, after payment of the composition upon all the scheduled debts, from receiving the composition upon his debt beyond the scheduled debt; but it is clear that such creditor will not be permitted to put his security in force until it has been ascertained that the trusts of the deed of composition, with respect to the other creditors, have been fully satisfied; and it is to be observed, that if the deed had been that the creditors should be paid their whole debts by instalments, and one of the creditors, at the request of the debtor, had given in only a part of his demand, taking a security from his debtor for the payment of the remainder, without reference to the agreed mode of payment by instalments, this would be clearly a fraud upon the other creditors; for although the creditor obtaining the security would not thereby receive more than the other creditors, yet with respect to the time of payment of part of his debt, he would be put upon a more advantageous footing than* they are. (1)

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It seems to have been once the opinion of the court of king's bench (2), that the case of one of the creditors taking an additional security from a friend of the debtor for payment of the whole of what such creditor was to receive under the deed of composition, did not fall within the principle of that class of cases wherein securities of this nature had been held void, as being against good faith and in fraud of the other creditors, for that here the creditor had received no more than the rest of the creditors, and it was no fraud upon them, that another person had agreed to join his security to the debtor's for the payment of the same sum which all the other creditors were to receive; but this case may be considered to have been over-ruled by a later case. (3)

The general rule of law is, that a person who is privy to a fraud cannot be relieved. And where A., who was entrusted by B. to receive interest on tallies, received the principal, and failed, and afterwards compounded with his creditors, but B. would not come in without having a greater composition, which A. agreed to give, and then brought a bill to be relieved against his own agreement, but the court of equity would not relieve him, being

(1) 1 Anst. 202.
(2) 6 T. R. 146.

(3) 4 East, 372.

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guilty of fraud and a breach of trust (1). Courts of law and equity, upon principles of public policy, will seldom enforce such underhand agreement. And in a more recent case (2), on the behalf of creditors, it was held that a bond given to secure one creditor the deficiency of a composition, if concealed from the other creditors, should be delivered up with costs, although the obligor was *particeps criminis*. Such bond is bad in equity as well as at law, (though formerly it was not bad at law), upon the ground of concealment; but Lord Eldon mentioned a case in which Lord Thurlow had held that such a bond, where part of the transaction was, that it should be communicated to the rest of the creditors, was good; and now in general the agreement may be avoided either by the debtor or by third persons (3). And in another case, a separate agreement securing to some creditors, who had executed a deed of composition, a greater advantage, and without the knowledge of the rest, was set aside (4). It has even been held, where a creditor had signed a composition deed in favor of his debtor, but afterwards induced the latter to give him bills of exchange for the full amount of his debt, dated on the day before the composition deed bore date, and afterwards received one instalment, and sued the debtor upon the bills, and recovered the amount, minus the instalment paid, that the debtor might recover back from his creditor the difference between the amount of the composition and the full amount of the debt. (5)

(1) 2 Vern. 602.; see 1 P. Wms. 620. now over-ruled by 1 T. R. 647.; see also 1 P. Wms. 768. Dougl. 696. 2 T. R. 763.

(2) 13 Ves. 580.

(3) 6 Ves. 306.

(4) 6 Ves. 300.

(5) 2 Dowl. & R. Repts. at Nisi Prius, 27.

CHAP. XIX.

Of the Remedies, &c. in case of Bankruptcy. (1)

IN the preceding chapter we have considered the various remedies which an individual creditor may, for his own particular advantage, pursue at law or in equity, in case of non-performance of a contract entered into with him. Upon a little consideration we shall perceive, that when a party is bankrupt or insolvent those remedies would frequently be inadequate. At law, each creditor must separately run through all the stages of unprofitable litigation, in order to obtain a separate judgment and separate execution; and there is no participation of the expence, or of the benefit, of one with those of another, for the common advantage of the whole; and whatever effects each obtains possession of by virtue of the process of the law or otherwise, he obtains for his own benefit, exclusive of the rest, and his execution vests in himself no interest in any thing but in what he actually seizes (2); and indeed, it is to be observed (3), that money, the surplus of a former execution against the defendant's goods, will not be stayed by the court in the sheriff's hands for the purpose of satisfying another execution, even at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff could levy; but the sheriff must pay over the surplus immediately to the defendant. So there is no provision made by our courts at Westminster, either on behalf of any one creditor or of all the creditors generally, for examining the debtor or other persons, to obtain or to compel a discovery of his effects, in order to have them applied in satisfaction of his debts; nor on behalf of the debtor, for his release or discharge, upon condition of surrendering all his property. So where the whole of the tangible property has been actually seized by his creditors, there may be no possibility of obtaining any further satisfaction; and

(1) See the several treatises on this important subject by Mr. Cooke, Mr. Cullen, Mr. Montague, and Mr. Whitmarsh; also some valuable observations by Mr. Coles, on the Amendment of the Law, and Selwyn's N. P., 1 vol. tit. Bankrupt, and Chitty on Bills.

(2) Cullen, Introduction, page 2.

(3) Vide 4 East, 510.

yet there may be forthcoming a great variety of property, such as money, bank notes, stock in the funds, bonds, bills of exchange, debts, and other choses in action, which cannot be taken in execution in satisfaction of a debt. The debtor may also, at any instant before a writ of fieri facias has been delivered to the sheriff by one creditor, defeat the effect of it, by assigning over his property to any other creditor in satisfaction of his debt; and though the creditor thus defeated in his execution against the property may still take the person of his debtor, the imprisonment is not always effectual to force payment from an obstinate and fraudulent debtor, who may persist in withholding the debt, and squander his property, which is not tangible whilst he is in gaol; whilst, on the other hand, he who is insolvent from accidental misfortune may still be detained in prison by a rigorous creditor, though he has nothing left wherewith to satisfy the debt. (1)

It is manifest that in a commercial country a strict adherence to this course of proceeding would be extremely inconvenient and disadvantageous to creditors, as well as harsh and inequitable to debtors. To avoid these objections our bankrupt laws were introduced, which constitute a mode of proceeding founded upon principles as rational as humane; and it is allowed at the suit or on the behalf of one or more of a man's creditors, at the common expence and for the common benefit of all of them. The debtor is at once, by operation of law, divested of all his property of every nature and description, both real and personal, which is transferred to trustees usually called assignees, chosen by his creditors. Large powers are given of inquiry and examination of persons, of seizure and recovery of effects; and the debtor himself is required, under the highest penalty of the law, to discover and deliver up all his property of every kind, the whole of which is afterwards divided amongst all his creditors in proportion to their several debts; and if the debtor make a full discovery, and appear to have acted without fraud, he then becomes entitled to a complete discharge both of his person and of any future property he may acquire, by obtaining his certificate, and also to a reasonable allowance out of his former effects, proportioned to the amount of the dividends that his estate pays to his creditors (2). The advantages, however, of this

(1) See Cullen, Introduction, 2.

(2) *Id.* 3.

system of law are confined exclusively to traders; a restriction founded upon the circumstance of traders having on the one hand greater opportunities of defrauding their creditors, and on the other, of incurring greater risks of losses and misfortunes than other persons.

It would not be within the scope of this work to treat upon the subject of the bankrupt laws with that minuteness that the subject deserves, but a concise practical outline will be given; and we have, in the course of the work, pointed out many miscellaneous decisions relating to bankruptcy, especially as it regards partners (1), mutual credit, and set off (2). We will arrange our inquiries under the following heads, viz.

1. The trading, or the person against whom a commission may issue.
2. The act of bankruptcy.
3. The petitioning creditor, and who may be.
4. The commission.
5. The assignment and its effects.
6. The proof of debts under commission.
7. The duties of bankrupt.
8. The certificate and its effects.
9. Of a new contract or promise by bankrupt.
10. Of superseding commission.

By the statutes 13 Eliz. c. 7. s. 1. and 1 Jac. 1. c. 15. s. 2. it is enacted that any person, natural-born subject, using the *trade* of merchandize by way of bargaining, exchange, re-exchange, bartry, chevisance, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling, may be subject to the bankrupt laws: any person, therefore, who is a trader, and is competent to contract on his own behalf, may be made a bankrupt. And upon the principle that a party cannot set up his own infraction of the law, in excuse for the non-performance of his contracts, it has been settled (3), that though a clergyman is prohibited by the statute Hen. 8. (4) from trading, as inconsistent with his clerical character, yet if he do trade, in defiance of this law, he is liable to be made a bankrupt. So in the same case it was admitted, that however it may in general be

1. The trading, or the person against whom a commission may issue.

(1) Ante, 252, &c.

(2) Ante, 676.

(3) 1 Atk. 197.

(4) 21 Hen. 8. c. 13. s. 5.

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beneath the dignity of a peer to be concerned in such branches of commerce as may involve him in debt, yet if he will engage in it, his privilege does not exempt him from the general operation of the bankrupt laws; and with respect to members of parliament, it is expressly enacted by 4 Geo. 3. c. 33., and 45 Geo. 3. c. 124., that by adopting the proceedings pointed out in those statutes a member of parliament engaged in trade is liable to the bankrupt laws. So by an exception in 7 Ann. c. 12. s. 5., the servant of an ambassador or other public minister may be a bankrupt; and the statute 21 Jac. 1. c. 19. s. 15. enacts, that aliens and denizens shall not be exempt from the provisions of these laws. A public officer, as an exciseman, &c., if a trader, may be subject to the bankrupt laws (1). So a smuggler may be a trader, though dealing only in contraband goods (2). A trader, having retired from business, may become a bankrupt in respect of debts contracted during the period of his trading (3); but infants (4) and married women (5) (unless she be a sole trader according to the custom of London (6), or in other respects, where her disability arising from coverture is removed (7)), being incompetent to contract on their own behalf as traders, cannot in general be made bankrupts.

It has been observed, that the bankrupt laws in general only apply to traders. The exemptions to that rule are founded upon an act of parliament (8), which provides that a scrivener, a banker, a broker, and a factor, and persons dealing in exchange and re-exchange, and gaining a profit by drawing and re-drawing bills of exchange, shall be liable to the statutes concerning bankrupts; and it has been considered that pawnbrokers (9), and stockbrokers (10), buying and selling stock by commission, are within the meaning of the statute. It has been questioned whether an insurance broker can be made a bankrupt. (11)

What constitutes a trading.

To constitute a trader the party must not only buy, but he must sell, and this must be in the way of trade; and the mer-

(1) 1 Atk. 206.

(2) 5 B. & A. 516. 1 Dowl. & R. 111.

(3) 1 Vent. 5. Ld. Raym, 287. 1 Selw. N. P. 180.

(4) Cro. Jac. 494. Str. 1083. Bull. N. P. 154. 1 Atk. 146. 201. 14 Ves. 603. Lord. Raym. 443.

(5) 2 Bro. 266.

(6) 1 Atk. 206. Burr. 1776. 1 Bla. Rep. 570.

(7) See ante, 48.

(8) 5 Geo. 2. c. 30. s. 39.

(9) 1 Atk. 206. 5 B. & A. 124.

(10) Cullen, 18.

(11) 4 Mad. 256.

chandizing, or buying and selling, must be of that kind in which he gains a credit upon the profits of an uncertain capital stock(1); it must also be a repeated practice of both buying and selling, and seeking a living by it (2); and in the general way of merchandize, and not in a qualified manner, or under particular restraints, or only for special purposes(3); and it must be in the party's own right (4). A merchant, therefore, or a grocer, or mercer, or a chapman who is one that buys and sells any thing, may be made bankrupts (5). So butchers (6), shoemakers (7), &c. or other persons who buy goods or the raw materials of trade, and sell them again, though under another form, or improved by the labour of manufacture, are also within the statutes (8). But labourers, husbandmen, artizans, or mere working tradesmen, and the like, cannot be made bankrupts. (9)

The trading, or against whom a commission may issue.

A person who buys any article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own produce could be sold unmixed, does not thereby become a trader (10); and so a person who buys pigs or other stock, with a view to a re-sale of them, as an auxiliary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader (11). A farmer bought rye grass seed, mixed it with seed of his own growth, and sold the mixture; he bought pigs, put them on his farm, fed them on the stubbles, and re-sold some after a week, some after longer periods, and it was held that neither of these was an act of trading. (12)

If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but where the produce of the land is merely the raw material of a manufacture, and the manu-

(1) 2 Wils. 171, 2.

(2) 2 Bla. Com. 476.

(3) Ib. 3 Brod. & Bing. 2.

(4) 1 Atk. 102. Co. B.L. 3d ed. 67. See Mr. Cullen's division of this general rule, 1 to 22.

(5) Cullen, 10. 2 Bla. Com. 476.

(6) Burr. 2146.

(7) Cro. Car. 31. Cro. Eliz. 268.

(8) See Cullen, 12. 3 Mod. 155. 330. Lord R. 610. 741.

1480. Good. 11, 12, 13.

(9) Cro. Car. 31. Cullen, 13.

(10) 7 Taunt. 409.

(11) Ib.

(12) Ib. 3 Bro. & Bing. 2. 6 Moore, 56.

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facture not the necessary mode of enjoying the land, there he is a trader (1); but a farmer who makes cheese on his own land, and buys runnet and salt, is not a trader (2). So, a man makes his own apples into cyder, and sells it, is not a trader (3). And a builder, who buys timber which he works into the houses which he builds, and sells the houses when built, is not a trader within the meaning of the bankrupt laws (4). A person working a limekiln on his own estate, for the purpose of manuring his own farm, and selling the surplus beyond what he requires for his farm, is no trader (5). So a building on a person's own land, for whatever purpose, cannot be considered as a buying and selling (6): a farmer and grazier exercising also the business of a drover, by buying cattle from time to time beyond the occasion of his farms, and selling them again, is exempted from the operation of the bankrupt laws by stat. 5 Geo. 2. c. 30. s. 40.; and the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a trader, for the hay had been purchased for the sake of the cattle, and not to sell again, and the sale of it was quite incidental, because there was more than was requisite for the cattle (7). The like point was decided in the court of C. P., with the additional circumstance that the defendant had re-sold on the same day, and in the same room, a quantity of oats, and which was to be delivered by the original seller to the new purchaser (8). It has been questioned, whether a farmer who deals largely in sheep, and sells some at fairs from his own farm, and makes purchases, and sells at the same fair at a profit and loss, and buys and sells others that had never been at any fair, be a trader within the 5 G. 2. c. 30. s. 40. (9). Cowkeepers (10), graziers, and drovers (11), are not subject to the bankrupt laws. Buying and selling horses, with an avowed intention to take out a licence, and become a dealer, is sufficient to constitute a trading within the meaning of the bankrupt laws, however limited the trading, and though no licence has been actually taken

(1) 1 T. R. 38, 9.

(2) *Ib.*

(3) *Ib.*

(4) 5 Esp. N. P. C. 147; and see 2 Wils. 169. Co. B. L. 46. 60.

As to brickmakers, see Cullen, 15. 1 T. R. 34. 783. 7 East, 442.

Proprietors of alum works are not traders. 1 T. R. 38, 9.; nor are workers of coal mines, *id.*

(5) 1 Vcs. & B. 360. 3 Brod. & Bing. 2.

(6) 2 Camp. 300.

(7) 11 East, Rep. 274. 3 Brod. & B. 2.

(8) 2 N. R. 78.

(9) 3 Moore, 58.

(10) 1 Wils. Ch. R. 85.

(11) 5 Geo. 2. c. 30. s. 40.

out (1). A person who having been a horse dealer, became a farmer, and in two years bought and sold for profit five or six horses, not calculated for the farming business, was properly made a bankrupt (2). So a fisherman buying fish at sea from other boats, for the purpose of making up his cargo, which he carried ashore and sold (3). A person who resides abroad, but who trades to England, coming over here occasionally, is an object of the bankrupt laws (4). And the publisher of a newspaper, buying the whole daily impression from the proprietors, re-selling it at a profit, and bearing the loss of such as remain unsold, is a trader within the bankrupt laws. (5)

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Buying or selling of land, or an interest in land, or land jobbing, is not within the statutes (6); nor buying and selling of bank stock or other government securities, they being, it is said, not such goods, wares, or merchandize, as are within the intent of the statute. (7)

Drawing and re-drawing bills of exchange for the sake of profit is a trading sufficient to subject a party to be made a bankrupt without other circumstances, if it be general and not merely occasional (8); for if it be occasional, though for the sake of profit, as where it is done for the purpose of raising money to improve a person's own estate, or for other private occasions, it will not render a person liable to the bankrupt laws (9). The statutes relating to exchequer bills (10) expressly provide that a party circulating the same shall not be deemed a trader within the bankrupt laws. Borrowing money abroad for the purpose of repaying it in England at a certain rate of exchange, and repaying it by bills upon bankers in London, to whom foreign bills were remitted to make the payment, was held to be a trading. (11)

By particular statutes, the holders of stock in various trading companies are declared not liable to be made bankrupts in

(1) 1 Price, 20.

(2) 1 T. R. 573. n. 2 N. R. 78.

(3) 3 Camp. 233.

(4) Cowp. 398. 1 Taunt. 270.

(5) 2 Marsh. 236.

(6) Cullen, 17.

(7) 2 Bla. Com. 476. Cullen,

17. 2 P. Wms. 308. Good. 17.

(8) 1 Atk. 129. Cullen, 10.

Cook, 52. Cowp. 745. 1 Mont.

22. 1 Atk. 128.

(9) Cowp. 745. 2 Esp. 555.

(10) See statutes, Cooke, 84.

(11) 5 T. R. 530.

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respect of their stocks in such companies, as the members of the bank of England (1), East India (2), English Linen (3), Guinea (4), London Assurance (5), Royal Exchange Assurance (6), South Sea companies (7), &c. &c.

No occasional dealings, without any intent to continue them, will render a person liable to be a bankrupt; and if a person buy and sell in the way of merchandize only occasionally, without any intent permanently to continue such dealing, he is not liable to be a bankrupt (8); and this question is always for a jury (9), whether from the acts of buying and selling, which appear in evidence, they can infer that he meant to buy and sell more, so as to constitute a general dealing, and which object is frequently attained by discovering whether he sold to every person who applied for the commodity, or only as a favour to a particular person? An innkeeper cannot, as such, be made a bankrupt (10), unless, indeed, he sells provisions out of the house to all customers applying for them (11); and publicans (12), alehouse keepers, and victuallers (13), fall within the same rule. A schoolmaster who buys and dresses provisions for his boarders (14), or who buys books and shoes, and sells them at an advanced price to his scholars (15), cannot be made a bankrupt; nor can the owner of a mine who buys candles and sells them to his workmen (16). A person who purchases dead horses for his dogs, and sells the skins and bones, does not thereby become a trader, although he might sell such skins at a profit. (17)

Contractors for victualling the royal navy (18), and other persons who merchandize or buy and sell in the way of any particular employment, and only for special purposes, and not in a general way, cannot be made bankrupts (19); nor is a

(1) 8 & 9 W. 3. c. 20. s. 47.

7 Ann. c. 7. s. 59. 3 Geo. 1. c. 8. s. 43.

(2) 13 & 14 Car. 2. c. 24. s. 3. 9 & 10 Will. 3. c. 44. s. 74.

(3) 4 Geo. 3. c. 37. s. 13.

(4) 13 & 14 Car. 2. c. 24. s. 3.

(5) 6 Geo. 1. c. 18. s. 15.

(6) *Id.*

(7) 9 Ann. c. 21. s. 42. 3 G. 1. c. 7. s. 7. 5 Geo. 1. c. 19. s. 27.

6 Geo. 1. c. 4. s. 55. 8 Geo. 1.

c. 21. s. 12.

(8) See 1 T. R. 572. 6 Ves. 3.

(9) See also, 2 Jo. 142, Sayer, 193.

(10) 1 T. R. 572. 2 Chitty, Repts. 651. Cro. Car. 549.

(11) *Id.*

(12) 1 Selw. N. P. 179.

(13) 4 Burr. 2064.

(14) 3 Mod. 330.

(15) Peake, 76.

(16) Co. B. L. 58.

(17) 6 Moore, 56. 3 Brod. & B. 2.

(18) 1 Vent. 270.

(19) See Cullen, 21. Sho. 269. Skin. 276. 3 Keb. 451.

receiver of the king's taxes (1), or any persons circulating
exchequer bills. (2)

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If a party holds himself out to the world as a trader, he cannot afterwards dispute it; therefore an acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading within the meaning of the bankrupt laws, although no acts of buying or selling were proved to have taken place during the partnership (3). The purchase of one lot of timber, with intent to sell again, will make a man a trader. (4)

We have next to consider what will constitute a sufficient *act of bankruptcy*. By the statute 1 Jac. 1. c. 15. s. 2., which in most respects follows the words of the 13 Eliz. c. 7. s. 1., it is enacted, that any person using the trade of merchandize, &c., who shall depart the realm, or begin to keep house, or otherwise to absent himself, or suffer himself willingly to be arrested for any debt or other thing not grown due, for money delivered, wares sold, or any other just thing or lawful cause or good consideration or purposes, or shall suffer himself to be outlawed, or yield himself to prison, or willingly or fraudulently procure himself to be arrested, or his goods to be attached or sequestered, or depart from his dwelling-house, or cause to be made any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors may be defeated or delayed in the recovery of their just and true debts, shall be adjudged a bankrupt.

2. Acts of
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By stat. 21 Jac. 1. c. 19. s. 2. any person using the trade of merchandize, &c., who shall either by himself, or others by his procurement, obtain any protection other than such person as shall be lawfully protected by privilege of parliament (5); or exhibit any petition or bill against his creditors to compel them to accept less than their just debts, or to procure time (6); or being arrested for a debt shall after his arrest be in prison two

(1) 5 Geo. 2. c. 30. s. 40.

(2) Cullen 21. See the several statutes relative thereto.

(3) 3 Moore, 226. S. C. 1 Taunt. & Brod. 9.

(4) 2 Taunt. 176.

(5) Granting protections has fallen into disuse. 3 Bla. Com. 289. 3 Lev. 332.

(6) These bills have been long exploded. See 1 Vern. 153.

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months or more upon that or any other arrest or detention in prison for debt, or being arrested for the sum of £100, or more, of just debt, shall after such arrest escape out of prison, shall be adjudged a bankrupt. And in the case of arrest or lying in prison from the time of the first arrest,

By stat. 5 Geo. 2. c. 30. s. 24. if any bankrupt, after issuing of any commission against him, pay to the person who sued out the same, or otherwise give or deliver to such person goods or other satisfaction or security for his debt, whereby such person shall privately have and receive more in the pound in respect of his debt than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed to be an act of bankruptcy, whereby on good proof thereof such commission shall and may be superseded.

Doubts having arisen whether a commission could be sued out against traders entitled to privilege of parliament, during the continuance of privilege, and such persons not being compellable to become bankrupts by reason of the freedom of their persons from arrests upon civil process, it was enacted by stat. 4 G. 3. c. 33., that the creditors to a certain value, viz. one creditor, or two being partners, to the amount of £100, two creditors to the amount of £150, and three to the amount of £200, of any trader within the description of the bankrupt laws, having privilege of parliament, may (upon affidavit of the debt and trading of the debtor filed of record in any of the courts at Westminster) sue out a summons or original bill and summons against such trader, and serve him with a copy; and if he shall not, within two months after personal service, pay, secure, or compound the debt, or enter into a bond in such sum, and with two such sureties as the court shall approve of, to pay such sum as shall be recovered in such action, with costs, he shall be adjudged a bankrupt from the time of the service of such summons.

This provision of the legislature was salutary, but having on some occasions, where bonds have been given in pursuance thereof, been rendered nugatory by the difficulty, and sometimes by the impossibility of enforcing the entering appearances in the actions for the payment of the sums to be recovered in which such bonds had been given, it was enacted by stat. 45 Geo. 3.

c. 124. s. 1., that when any summons or original bill and summons shall be sued out against any person deemed a merchant, banker, broker, factor, scrivener, or trader within the description of the acts relating to bankrupts having privilege of parliament, and such affidavit of the debt duly made and filed, as in the act of the 4th G. 3. c. 33. mentioned, and such merchant, &c., shall enter into such bonds as in the said act mentioned, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, every such merchant, &c., shall also, within two months after personal service of such summons, cause an appearance to be entered to such action in the proper court in which the same shall have been brought, and in default thereof he shall be adjudged bankrupt from the time of the service of such summons, and any creditor may sue out a commission against any such person, and proceed therein in like manner as against other bankrupts; and by the third section, after reciting that the proceeding by *distringas* was extremely dilatory and expensive, it is enacted, that when any summons or original bill and summons shall be sued out against any person having privilege of parliament, and no such affidavit shall be made and filed as in the said act of the 4th G. 3. c. 33. and hereinbefore is mentioned, if the defendant shall not appear at the return of the summons, or within twenty-eight days after such return, in every such case it shall be lawful for the plaintiff, upon affidavit being made and filed in the proper court of the personal service of such summons (which affidavit shall be filed gratis), to enter an appearance or appearances for the defendant, and to proceed thereon as if such defendant had entered his appearance. (1)

Act of bankruptcy.

The definition of a bankrupt is a trader who secretes himself, or does certain other acts tending to defraud his creditors. In general, whenever a trader has endeavoured to avoid his creditors, or evade their just demands, this has been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out; for the law is extremely watchful to detect a man whose circumstances are declining in the first instance, or at least as early as possible, that the creditors may receive as large a proportion of their debts as may be, and that

(1) See 1 Selw. N. P. 184 to 187.

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a man may not go on wantonly wasting his property, and then claim the benefit of the statutes when he has nothing left to distribute. (1)

There is only one mode by which a person can be *compelled* to commit an act of bankruptcy, namely, by neglecting to pay a debt, and being arrested and not being able to procure bail, and lying in prison upon such arrest for two months. In all the other acts of bankruptcy which we shall have occasion to mention, it will be perceived that they are *voluntary* on the part of the trader, and afford decisive proof, either of his intention to defraud his creditors, or of his affairs being in that declining state, that it can be neither advantageous to himself or to his creditors to entrust him any longer with the management of his own business. In the first case, also, his inability or reluctance to procure bail furnishes a strong inference of his being no longer fit to be entrusted with the management of his affairs. All the acts of bankruptcy are respectively founded on different legislative provisions, and there is no common law act of bankruptcy; and those declared by the legislature afford decisive evidence of what the law deems an intent to delay or prejudice creditors.

Acts of bankruptcy may be divided into three classes: 1st, Those which relate to the person of the trader, and which are considered as fraudulent endeavours to defeat his creditors of their legal remedy against the person; 2d, Those which relate to dispositions of his effects, and which are considered as fraudulent endeavours to defeat them of their remedy against his property; and, 3dly, Of those which relate merely to the state of his circumstances or credit, and which are considered as presumptions of insolvency, but in which fraud, though it may exist, is not a necessary ingredient (2). Those of the first description are, the trader's departing the realm, absenting himself from his dwelling, beginning to keep house, and some other acts having a view to his personal protection; or, on the other hand, voluntarily submitting to a deprivation of personal liberty. We shall consider these in their natural order.

(1) 2 Bla. Com. 477.

(2) Cullen, 30.

A trader by *departing the realm* with an intention to delay, or whereby his creditors are delayed of their debts, &c., constitutes an act of bankruptcy. The words in the statute of 1 Jac. 1., "to the intent *or whereby* his creditors *shall* or *may* be defeated or delayed," are considered as equivalent and synonymous with these words, "to the intent his creditors *shall*, or *that thereby* they *may* be defeated," &c., and not as meaning, "with the intent *and whereby*" his creditors may be defeated. The act of bankruptcy will in general depend on the intent (1). The intention, therefore, of delaying creditors, is sufficient, though no creditor be delayed; but the converse does not necessarily hold good (2). Such intention will be apparent from the circumstances of each particular case. If a trader, whose house of trade was in Ireland (but who had also a house in London, where his wife and family resided), having come to England to settle his affairs, being informed that one of his creditors intended to arrest him, quitted England, and went over to Ireland in order to avoid such arrest, the court of common pleas held that this was a departing the realm with intent to delay his creditors sufficient to constitute an act of bankruptcy (3). And though the delay of creditors be not the immediate or principal object of the party, yet if that must have been the necessary consequence of such a proceeding, it would be evidence of his intent to delay or defeat his creditors, as he must be supposed to foresee and intend whatever is the necessary consequence of his own acts (4). It has been even decided, that if a trader leave the realm for the purposes of trade, but, whilst he is absent, announce his intention never to revisit England, he commits an act of bankruptcy by absenting himself (5); but the correctness of this decision is very questionable. It is quite clear, that a trader who leaves England, and proceeds to Ireland with an honest intention, compatible with trade (where he also carries on trade), does not thereby commit an act of bankruptcy, although he never returns, and although he leaves no funds in England for the payment of his debts. (6)

Act of bankruptcy.

Departing the realm.

(1) See 6 B. & A. 55. 2 Dowl. & R. 142. S. C. 9 East, 493. 14 Ves. 80. 2 Brod. & B. 392. 2 Phillips on Evid. 327., acc. 7 T. R. 509. cont. (2) Id. *ibid*. (3) 1 Taunt. 270. (4) 7 T. R. 516. 1 Camp. 279. 3 Camp. 531. Bull. N. P. 39. (5) 1 Stark. 146. (6) 1 Stark. 145.

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ruptcy.

Keeping house.

Beginning to keep house, though for ever so short a time (1), in order that creditors may be delayed, is an act of bankruptcy. Here, again, the preceding observation as to the construction of the words, "to the intent or whereby," &c. are applicable. The beginning to keep house with such intention is sufficient, though no creditor is actually delayed. (2)

The beginning to keep house is only put as an instance in the act; and there are various other ways in which a debtor may exhibit an intention to delay creditors, which would equally amount to an act of bankruptcy, as by shutting himself up in a box, if it were done with intent to delay (3). So, if a person shuts himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy is established by proof of his having done so; and generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy (4). If a man who has no house of his own keeps in another man's house, it is within the statute (5); or keep on ship-board (6); or if a miller keep himself within his mill, or a churchwarden within the church. (7)

A denial by a trader, or by his authorized agent, to a creditor, who calls to see the trader, and demand payment of the debt, the trader being at home, is the most frequent evidence brought forward to prove the intention to delay; but such a denial does not of itself constitute an act of bankruptcy, but is only evidence of a beginning to keep house, which, if accompanied with an intention to delay creditors, is indisputably an act of bankruptcy (8). The evidence of such intention must necessarily depend on the facts of each particular case, and be left to a jury (9). An order to a servant to deny all persons, or all creditors, is sufficient evidence

(1) Palm. 325. See 2 T. R. 59. and see a case mentioned in 2 T. R.

(2) 6 B. & A. 55. 2 Dowl. & 59.

R. 142. S. C. 2 Brod. & B. 388. (6) Stone, 123.

9 East, 493. 1 M. & S. 679. (7) Com. Bankrupt. C. 1. Cul-

(3) 2 Brod. & B. 393. 1 Camp. len, 37.

271. (8) 5 T. R. 575. 2 Brod. & B.

(4) 1 Camp. 271. 392. 9 East, 487.

(5) Stone, 124. Cullen, 37.; (9) 1 Taunt. 273. 4 Taunt. 603.

of this intention (1). Where a trader, having been arrested on the 20th May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again, and on the morning of the 21st the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was; it was held that an act of bankruptcy was committed on that morning, although no creditor was actually denied (2). If a trader keeps house, and causes himself to be denied to a tax gatherer, who calls for the taxes, it is an act of bankruptcy. (3)

Act of bank-
ruptcy.
Keeping house.

The denial must be to a creditor, who has a debt demandable at the time, or to some authorized person calling on his behalf (4); any denial therefore to a creditor, by a note payable at a future day, is no act of bankruptcy (5). A denial to a person coming only on behalf of a creditor has been held insufficient (6); but this strictness has been relaxed, or at least the objection has not been taken in later cases, where the act of bankruptcy was a denial to a creditor's clerk (7). The intention with which the creditor comes is in general immaterial (8). A denial by the trader's clerk may be considered as authorized by the trader, unless it is shewn to have been made without his authority. (9)

This denial to a creditor is of itself an equivocal act, and open to explanation, as where a man is denied only because he is attending upon a particular engagement, a sick person, or engaged at dinner, or the like plausible excuses. (10)

Where there is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances; but where the act is in itself doubtful, it may be explained. Therefore, where A. was denied in the morning by express orders to the holder of a bill which was due, it was a complete act of bank-

(1) See 2 Brod. & B. 392.
5 T. R. 575.

(2) 6 Barn. & Ald. 55. 2 Dowl.
& R. 142. S. C.

(3) 2 Taunt. 401.

(4) 1 Rose B. Ca. 150. 2 Brod.
& B. 388.

(5) Bull. N. P. 40.

(6) 7 Vin. 61.

(7) Bull. N. P. 39. Cullen, 36.

(8) 3 Ves. & B. 128. 2 Rose,
67.

(9) 2 Phillips on Evid. 329.

(10) 9 East, 487. 1 Camp. 271.
3 Camp. 349. Bull. N. P. 39.
Co. B. L. 59.

Act of bankruptcy.

Keeping house;

ruptcy, though he afterwards paid the bill before five o'clock in the same day, and though by the custom of merchants in London the payer of a bill has the whole day on which a bill becomes due till five o'clock to discharge it in (1). If a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy, although the trader immediately overtakes the creditor, and says he was not afraid of him, but of another creditor (2). A bill having become due, and the drawer being pressed for payment, desired the holder to call upon him the next morning at a friend's house, and he would pay him; the holder went accordingly, and was denied, at the drawer's request; upon being asked by his friend if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said he did not mean to do so, and went afterwards and paid the bill: lord Mansfield told the jury, that if they were satisfied that the denial had been with a view to delay the creditor at the time, it was an act of bankruptcy, and if so, it could not be purged by paying the bill afterwards. (3)

or otherwise absents himself.

If a trader *absent himself* with a design to defraud or delay his creditors, he shall be adjudged a bankrupt, though no creditors be thereby delayed (4). And the words, "or otherwise to absent him or herself," in these statutes, are not confined to an absents from the dwelling-house or any particular place; therefore, where a man, in the habit of attending the Royal Exchange to collect news, left it at the sight of his creditors, desiring a friend to say he was not there, or broke an appointment he had made with a creditor to meet him there, or (being the proprietor of a theatre) retired behind the scenes to avoid a sheriff's officer, at the same time giving orders to be denied to him; it was held that each of these was an act of bankruptcy (5). The intention of the trader is a question for a jury, and which must necessarily depend on the facts of each case. A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not

(1) 2 Term. Rep. 59.

(2) 1 Taunt. 479.

(3) 2 T. R. 62.

(4) 5 Esp. 139. 9 East, 487.

1 Taunt. 270. 1 M. & S. 676.

2 Marsh. 233. 6 Taunt. 540.

6 B. & A. 55. 2 Dowl. & R. 142. S. C.

(5) 2 Marsh. 236. S. C. 6 Taunt. 533. See Com. Dig. Bankrupt. c. 1.

pay him that day, and would go out of the way and stay till dinner-time; and it was held that it was for the jury to consider whether he absented himself to delay a creditor, and this evidence warranted their conclusion that he did not (1). So where he absented himself from his house, where his creditors were, to avoid irritation and harsh language, (2). A trader, being informed by the attorney of the petitioning creditor that he has delivered a warrant to arrest him to a sheriff's officer, who is seeking him for the purpose of executing it, and is advised by the same attorney to repair to his office to avoid the publicity of being arrested in the street, which he does, and remains there a considerable time, was held not to have committed an act of bankruptcy within the meaning of the statutes, so as to defeat an action against the sheriff by a judgment creditor, to recover the proceeds of his goods taken or sold under a *fieri facias* sued out since the supposed act of bankruptcy (3). But where a trader, having a counting-house in town and a dwelling-house in the country, left the former (to which he never returned), taking his books with him, and slept at his dwelling-house a few nights, when he finally left that also; it was held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, within the meaning of the 13 Eliz. c. 7. s. 1., and thereby committed an act of bankruptcy (4). So where a trader, upon being arrested for a debt of £135, escaped from the officer, and fled into the house of another, and was pursued by the officer and inquired for at the house, but was denied, and the door kept fast, and whilst he remained there declared that he did it for fear of other creditors, and when it was dark, returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bedchamber; it was held that this constituted one or more act or acts of bankruptcy under the words of the statute, "beginning to keep house," or "otherwise absenting himself." (5) So where a trader went to his neighbour, and told him that he expected to be arrested, and while he remained there was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch; and when told that

Act of bankruptcy.

(1) 4 Taunt, 603.

(2) Id.

(3) 3 Price, 142.

(4) 1 New Rep. 234.

(5) 1 Maul. & Selw. 338.

Act of bankruptcy.

the officer had gone past his house, and had left the street, immediately returned home: it was held that this was an act of bankruptcy within the words of 13 Eliz. c. 7. and 1 Jac. 1. c. 15., “otherwise absenting himself to the intent to delay creditors,” although it appeared that not only no creditor was delayed, but that none could possibly be delayed (1). Where two traders, in partnership, left their shop, and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them in case a creditor should call; on that and the following day a creditor called, when they were both at home, and desired to see either the one or the other of them, when the shopman denied them, without being authorized by them so to do: it was held that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors. (2)

By suffering himself willingly to be arrested for debt not due, or suffering himself to be outlawed;

A trader by “*suffering himself willingly to be arrested* for any debt or other thing not grown due, for money delivered, goods sold, or other just thing or lawful cause, or good consideration or purposes, or by suffering himself to be outlawed,” shall be adjudged a bankrupt (3). There are no cases on this clause of the statute.

or yield himself to prison;

A trader by yielding himself to prison with intention to delay or defraud his creditors, thereby commits an act of bankruptcy. In a case where B. was arrested for £28, and though he had money sufficient to pay the debt, yet chose rather to go to prison, in order, as he declared, to force his creditors to come to a composition, it was held an act of bankruptcy. (4)

or fraudulently procuring himself to be arrested, or his goods, &c. to be attached, &c.

If a trader willingly or fraudulently procure himself to be arrested, or his goods, money, or chattels to be attached or sequestered, he thereby commits an act of bankruptcy. It has been said (5), that the word attachment being coupled with arrests and sequestrations (6), shewed that the legislature meant

(1) 1 Maul. & Selw. 676. 2 Bank. 61, 62. pl. 15. Marsh. 233. 6 Taunt. 540.

(2) 3 Moore, 4.

(3) 13 Eliz. c. 5. s. 1. 1 Jac. 1. c. 15. s. 2.

(4) 7 Vin. Ab. tit. Cred. and

(5) Per Lord Mansfield, C. J. Cowp. 428.

(6) A sequestration in London is a method of proceeding in an action of debt, where the party

that sort of attachment by which suits are commenced, and that they plainly had in view the customs of London and other towns, where that species of process is made use of. Hence where a person executes a bond and warrant of attorney to confess judgment, either for a *bonâ fide* debt (1), or for a larger sum than is really due (2), and judgment is entered up accordingly, and the debtor's goods taken in execution, such execution is not an "attachment," and consequently is not an act of bankruptcy within the meaning of this clause.

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In order to constitute an act of bankruptcy, by a trader in *departing from his dwelling-house*, it is not alone sufficient, that a creditor should be thereby delayed, but the departure must also have been with that intent (3). And it is not sufficient to constitute such an act of bankruptcy, that a sheriff's officer, who comes to levy a *fi. fa.* on the trader's effects, is refused admittance after the trader had left his house (4). Absconding to avoid an attachment upon an award for non-delivery of goods pursuant to the award, is not an act of bankruptcy (5). The departure of a creditor from his house, with an intent to delay his creditors, is an act of bankruptcy, though no creditor be thereby in fact delayed (6). Whether a departing the dwelling-house be accompanied with an intent to delay a creditor is a question of fact for a jury to decide upon all the circumstances; if it be not accompanied with such intent, it is no act of bankruptcy (7). A trader who has no settled house or counting-house, but takes up a temporary abode at a public house in the place to which his business carries him, commits an act of bankruptcy by departing from such public house with intent to delay his creditors. (8)

Departing from dwelling-house.

cannot be found, in which case, upon the action being entered, the officer goes to the warehouse of the defendant where the goods are, and fixes a padlock on the door; and if the defendant does not put in bail in time, judgment is given against him, and his goods are sold in satisfaction. See 1 Selw. N. P. 194. n. 18.

(1) Co. B. L. 5 ed. 100.

(2) Cowp. 427.

(3) 7 Term Rep. 509.; see also 5 Esp. N. P. C. 139. 9 East, 487. 8 T. R. 149.

(4) 8 Term Rep. 149.

(5) 1 Atk. 196.

(6) 9 East Rep. 487.; and see 9 East Rep. 490. notes and cases there cited; also 1 Taunt. 270. 1 M. & S. 676.

(7) 1 Taunt. 273. n. S. P. 7 Term Rep. 512. n.; see 1 Burr. 467.

(8) 2 Taunt. 176.

Act of bankruptcy.
Fraudulent grant
or conveyance of
property (1).

“The making of a fraudulent grant or conveyance of the trader’s lands or chattels, to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts,” is declared to be an act of bankruptcy (1). The grant or conveyance within the statute must be by deed (2). The act of bankruptcy then consists in the fraud intended against the creditors, which is carried into effect by the execution of the deed; and whether a person has been guilty of fraud in a particular transaction is generally a conclusion of law upon the facts proved. The circumstances extrinsic of the deed, most commonly insisted upon as evidence of fraud, are the following; the non-delivery of the effects into the actual possession of the grantee, according to the tenor of the conveyance, the fact of the conveyance being made in contemplation of bankruptcy, the secrecy, the unseasonable hour, and other suspicious appearances when the conveyance is executed; on the other hand, the fairness and equity of the transaction, the benefit resulting to the general creditors, and the solvency of the trader at the time of his executing the deed, are circumstances of honesty, and strongly in his favor. On the plain construction of the words of the statute, it might be reasonably inferred, that only such conveyances can be acts of bankruptcy as are therein specified and described; namely, such as have been made with the intent or whereby the creditors shall or may be defeated or delayed in the recovery of their just debts; however, the courts of common law have in several instances determined that a conveyance of all the trader’s estate and effects, or of all with a merely colourable exception, is in itself a complete act of bankruptcy (3); and this decision has proceeded upon two reasons; first, that the trader necessarily deprives himself by such an act of the power of carrying on his trade; secondly, that he endeavours to put his property under a course of application and distribution among his creditors, different from that which would take place under the bankrupt laws (4); reasons which manifestly have no reference to the intent or effect designated by the legislature. The rule however has long been so settled, that it

(1) Ante, 698, &c. 1 Jac. 1. c. 15. s. 2.; see 2 Phillips on Evidence, 331. 326. Cullen, 42 to 57. 1 Montague, Dig. Bankrupt Law, 36, 37.

(2) Cullen, 42. Burr. 2174. 2235. Cowp. 117.

(3) 16 Ves. 148. Cowp. 629. Cullen, 50.

(4) 17 Ves. 199.

is too late at this time to examine the principle (1). A conveyance also by a trader of only part of his property, made voluntarily by him in order to give a preference to particular creditors, to the prejudice of the general creditors, is an act of bankruptcy, although he afterwards continue to carry on his trade for three years, at the expiration of which time a commission issued against him (2). A bill of sale to a particular creditor of all the effects of a trader, in trust to satisfy his debt, and to pay over the surplus (if any) to the trader, who then knew himself to be insolvent, is an act of bankruptcy; and such conveyance is invalid, notwithstanding the bill of sale was given by the trader when under arrest, at the suit of the particular creditor for a just debt (3). An assignment by deed by traders of all their effects, in trust for payment of creditors generally, unless all their creditors concur, is an act of bankruptcy (4). So is such an assignment when made by partners, unless all the separate creditors of each concur as well as the joint creditors (5). But an assignment by a person residing in India, and trading there, and drawing bills on England of all his effects, in trust for his creditors in certain proportions, executed by him while resident in India, is not an act of bankruptcy (6); neither is such an assignment fraudulent and void in itself, being intended honestly at the time, and assented to by the generality of the creditors (7); neither can the assignment of the bankrupt's effects by the commissioners be considered tantamount to a revocation of the trust deed by the bankrupt himself, under a clause in such deed which empowered him to vacate the instrument if any creditor to a certain amount refuse to subscribe it (8). A deed whereby a debtor being pressed, conveys estates in trust to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference in contemplation of bankruptcy, is an act of bankruptcy (9). Where a trader, one of two partners, conveyed to trustees, not his creditors, all his freehold, leasehold, and copyhold, but not his personal property (which formed but a small part of the whole), in trust by sale, mortgage, or other disposition thereof to raise money, whereby the trader might be en-

Act of bank-
ruptcy.

(1) 17 Ves. 199.

(2) 4 Barn. & Ald. 382.

(3) 7 East Rep. 137.

(4) 8 Term Rep. 140. 16 Ves.

148. 1 Esp. R. 237. Burr. 477.

(5) 8 Term Rep. 140.

(6) 5 Term Rep. 530.

(7) Id.

(8) Id.

(9) 3 Taunt. 241.

Act of bankruptcy.

abled to facilitate a settlement with his creditors, (the pecuniary assets of the firm not being sufficient to cover the pecuniary engagements of the firm), and also gave to other persons, not creditors, a power of attorney enabling them in the fullest manner to act for him in this settlement, and afterwards prepared a deed for the purpose of conveying all his above-mentioned landed property to two other trustees, with a view to raise £170,000 in negotiable bills, and to indemnify the drawers of those bills, but nothing was ever done under this deed, it was held that these circumstances did not constitute an act of bankruptcy (1); and a transfer of property under similar circumstances is no act of bankruptcy, notwithstanding a slight difference from the foregoing circumstances in the following particulars: 1st, No mention of the trader's personal property: 2d, No statement that the trustees to the transfer were not creditors of the bankrupt: 3d, No mention of the trader's motive: 4th, No mention of the abstract of the unexecuted deed furnished to the purchasers: 5th, An additional statement that on or about the time of the execution of the transfer, the trader was insolvent, and stopped payment (2). A deposition in which it is stated that the deponent saw the bankrupt execute an assignment of all his effects to a trustee for the benefit of his creditors, is sufficient evidence of an act of bankruptcy, without producing the deed of assignment itself, such deposition being in evidence amongst the other proceedings, under stat. 49 Geo. 3. c. 121. s. 10. (3)

Those who are privies, and assent to a deed of assignment by a debtor, cannot set it up as an act of bankruptcy (4). A deed whereby a bankrupt conveys all his property in trust to be divided amongst his creditors, is an act of bankruptcy, though the creditors with whom such deed was in the first instance concerted afterwards, and when it was executed, changed their purpose unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative, though it contain a proviso to be void, if the trustees think fit. And a commission of bankrupt being afterwards sued out thereon, upon the petition of a creditor who had not concurred in such fraudulent deed, and who, together with others who had concurred,

(1) 1 Brod & B. 408. 4 Moore, 322. S. C.
126. S. C.

(3) 2 Stark. 200.

(2) 1 Brod. & B. 482. 4 Moore, (4) 2 Term Rep. 594 n.

was chosen an assignee, it is no objection to an action brought by them as assignees, that some of them had concurred in such deed (1). For such estoppel, it seems, applies only to the petitioning creditor. (2)

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ruptcy.

A creditor obtains a preference in contemplation of an intended deed of composition, which would be fraudulent against the creditors under that deed; the composition going off, the creditor may hold his securities against a commission of bankruptcy subsequently issued, and not contemplated at the time of the preference. (3)

The stat. 21 Jac. 1. c. 19. s. 2. enacts, that a person, being arrested for debt, lying in prison two months (4) or more upon that or any other arrest or detention in prison for debt, shall be accounted a bankrupt from the time of his first arrest. In this species of act of bankruptcy fraud is not a necessary ingredient. The lying in prison must be for a subsisting debt recoverable at law, and not for a demand recoverable only in equity, or not completely due, or only upon a criminal charge. The two months sometimes are computed, not from the time of the first arrest, but from the time of the surrender, for the presumption of insolvency arises not from the mere circumstance of being arrested, which may happen to the most substantial trader, but from the lying in prison two months without being able to find bail (5). But if the bail is a mere matter of form, and put in without justification, only for the purpose of turning the party over from one custody to another, that is not considered as a being out of custody, but is a continuation of the same imprisonment within the meaning of the statute, and has relation to the first arrest (6). In general, where a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, or the going to prison, as the case may be, so as to vest his property in the assignees from that time (7). Yet no commission can be sued out on such an act of bankruptcy until the expiration of the two months (8); and the day of the arrest is to be reckoned the first of the two months (9).

Lying in prison
for two months
or more.

(1) 4 East Rep. 230.

(2) Id. 235, 6.

(3) 5 Taunt. 109.

(4) Means lunar months.

(5) 2 Bla. Com. 478.

(6) Burr. 437; and see 3 East, 407. 1 Camp. 509. Willes, 464.

(7) 2 Term Rep. 141.

(8) 8 Term Rep. 507.

(9) 3 East Rep. 407.

Act of bankruptcy.

Where a person was arrested, but on account of illness was permitted to remain a few days in his own house, in the custody of the officer's follower, who was not named in the warrant, but who kept the key of the house in his possession, and he was then removed to jail, where he continued for the remainder of two months, it was held that this was a legal imprisonment, so as to constitute an act of bankruptcy (1). So where the sheriff took possession under a *fiery facias*, and at a late hour of the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy, and by the statute 21 Jac. 1. c. 19. was a bankrupt from the time of his arrest, it was held that, in an action by his assignees to recover the value of such goods, the court would notice the fraction of a day, and therefore, that the sheriff having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover (2). And when the execution and act of bankruptcy (a denial to a creditor) are on the same day, it is open to inquiry which has the priority (3). And where the bankrupt lay in prison two months on civil process, after criminal process had been discharged, and the discharge had been delivered to his attorney; it was held that this lying in prison constituted an act of bankruptcy, though it did not appear that the bankrupt had personal notice of the discharge. (4)

Escaping out of prison.

If a trader, being arrested for the sum of £100, or more, of just debt, do, after such arrest, escape out of prison, he thereby commits an act of bankruptcy. (5) But where A., having been arrested for a debt in Kent on the 31st March, was on the 6th May following brought up by an *habeas corpus*, in order to be turned over; on the road to the judge's chambers, A. was permitted to call at a house in the city of London, and was carried thence to a judge's chamber to be bailed, and accordingly was bailed, but instantly there surrendered by his bail in discharge of themselves, and thereupon committed to the King's Bench prison, where he lay above two months; it was adjudged that this passing through another county by the permission of the

(1) 1 Marsh, 469. S.C. 6 Taunt. 106. 4 Camp. 164.

(2) 2 Barn. & Ald. 586.

(3) 4 Camp. 197.

(4) 1 Brod. & Bing. 308. 3 Moore, 656. 7 Price, 616. S.C.

(5) 21 Jac. 1. c. 19. s. 2. Cul-
len, 40.

sheriff was not an escape within the meaning of the act, which requires that the escape must be such as shews that the trader meant to run away and defeat his creditors. (1)

Act of bankruptcy.

We have next to consider who may be a petitioning creditor, and in respect of what debt, so as to strike a docket, and cause a commission to issue, and what conduct he must observe. The statute 5th Geo. 2. c. 30. s. 23. requires that the debt of a single creditor, or of two or more being partners, shall amount to £100, that the debt of two separate creditors shall amount to £150, and of three or more to £200. It must be a debt at law, and no debt in equity will support a commission; and if a legal demand is not from its nature assignable, the assignee thereof, notwithstanding his equitable claim, cannot be the petitioning creditor, as the assignee of a bond. (2)

3. The petitioning creditor, and who may be.

There is a remarkable difference between the remedies afforded by the common law, and under a commission of bankruptcy for the payment of debts, with respect to *the time* when the remedy may be adopted. We have seen that in general no action can be commenced before the credit has expired, and the debt is completely due and payable; but in the case of bankruptcy, where a written security has been taken for a debt, and the contracting party has committed an act of bankruptcy, the creditor may in general strike a docket and issue a commission before the security is payable, provided, after deducting interest for the time the security has to run, there is a debt of £100. The 7 Geo. 1. c. 31. enabled persons who had given credit on bills of exchange, bonds, promissory notes, or other written securities not due at the time of the party's becoming bankrupt, to *prove* the same under a commission, deducting a rebate of interest at five per cent, but the 3d section prohibited any such creditor from issuing a commission; but the 5 Geo. 2. c. 30. s. 22. removed such restriction, and enables such a creditor to issue a commission (3). And it was recently determined (4) that bills of exchange to the precise amount of £100, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient, *when due*, to found a petition for a commission of bankruptcy against him, provided at the time the commission

(1) 1 Burr. 437. Cullen, 40.

(2) 1 P. Wms. 783.

(3) 13 East, 213.

(4) Id. *ibid*.

The petitioning
creditor, and
who may be.

was issued he was creditor to the amount of £100. Where A., having drawn a bill of exchange for £148 in favour of B., to whom he was previously indebted to that amount, committed an act of bankruptcy before the bill became due, or had been presented for acceptance, it was held that such bill was a good petitioning creditor's debt, although it appeared that it had been duly presented and paid by the acceptor, subsequently to the commission. (1) So a creditor of an insolvent trader may, after his discharge under the 55 Geo. 3. c. 102., take out a commission of bankruptcy against him; and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt to support the commission (2). These statutes, however, only enable creditors upon *written* securities to issue a commission, provided, at the time the act of bankruptcy was committed, he was indebted to the amount of £100; and they do not enable a creditor for goods sold on credit not elapsed to strike a docket. And therefore where (3) goods had been sold upon an agreement to be paid for by a present bill payable at a future day, it was held that this demand did not create a present debt on which to found a commission of bankruptcy, and that such executory contract could not be considered as a security within the meaning of the statutes just mentioned; and though the 49th Geo. 3. c. 121. s. 9. enables them to prove their demands, yet it does not enable them to issue a commission before the credit has elapsed. Where a bond is payable on demand, a demand must be made to constitute a good petitioning creditor's debt (4). Interest accruing before bankruptcy on a bill of exchange, being in the nature of damages, cannot be added to principal to constitute a petitioning creditor's debt. (4)

With respect to the conduct of the petitioning creditor desirous of striking a docket, the statute 5 Geo. 2. c. 30. enacts, that no commission shall be awarded and issued out against any person, unless the creditor petitioning for such commission shall before the same shall be granted make an affidavit or affirmation of the truth and reality of such his debt, and likewise give bond to the chancellor, and in the penalty of £200 conditioned for proving his debt, as well before the commissioners as upon a trial at law, in case the due issuing forth of

(1) 4 Barn. & Ald. 67.

(2) 2 Barn. & Ald. 256.

(3) 9 East, 498.

(4) 2 B. & A. 802.

the same shall be contested and tried, and also for proving the party a bankrupt at the time of taking out such commission, and further to proceed on such commission (1). Therefore it appears (2) that as an infant cannot give a valid bond, unless it be merely for the payment of a debt for necessities, he cannot be a petitioning creditor; and as the statute imperatively requires the petitioning creditor to give the bond, it cannot be given by the solicitor to the commission issued by an infant. The making of the affidavit of the debt, and the executing of this bond, is called striking a docket, the effect of which act is, that the petitioning creditor is thereby precluded from afterwards compromising with his debtor, without leave of the chancellor. For as has been observed (3), the instant the docket is struck the creditors at large are interested in the proceeding, and it cannot be abandoned without their concurrence. If two dockets are struck against the same person at different times, and commissions issue upon each, the second commission will be superseded (4). And though there is an order that the striking a docket shall not prevent the issuing of a commission on the petition of another creditor, unless the party striking the docket seal his commission in four days exclusive of the day of striking it, yet a practice has prevailed contrary to the terms of this order. (5)

The petitioning creditor, and who may be.

We have fourthly to consider the commission itself, and the modes of proceeding thereon. The stat. 13 Eliz. c. 7. s. 2. enacts, that the lord chancellor, or lord keeper of the great seal for the time being, upon every complaint made to him in writing against any such person or persons, being bankrupts as is before defined, shall have full power and authority, by commission under the great seal of England, to name, assign, and appoint such wise and honest discreet persons (7) as to him shall seem good, who, or the most part of them, by virtue of their act and of such commission, shall have full power and authority to take by their discretions such order and direction with respect to the present property of the bankrupt (8). The commission is

4. The commission. (6)

(1) See 1 Montague, 390.

(2) 3 Ves. jun. 554.

(3) 1 Ves. jun. 157. 3 Ves. jun. 349.

(4) 6 Ves. 434.

(5) 6 Ves. 429.

(6) See 1 Mont. 393.

(7) A creditor cannot be commissioner. 2 Mad. 292.

(8) Commissioners not liable in trespass, 1 Barn. & Cres. 163. 2 Dowl. & R. 350.

The commission. not issued out of chancery, as sometimes alledged in pleading; it is quite independent of the court of chancery; and it was on this ground held, that no stamp was necessary on a commission, it not being the process of any court as described in the statute (1). The granting of a commission is not discretionary, but claimable by the creditor as a matter of right. (2)

When the commission is sealed, one of the messengers is employed to summon a private meeting of the commissioners to open the commission; upon which, and before the commissioners proceed to the execution of any of their powers, the stat. 5 Geo. 2. c. 30. directs, that two or more of them must personally administer to each other an oath prescribed by the act, faithfully and impartially to execute the trust reposed in them. When the commissioners have received proof of the petitioning creditor's debt, the trading, and the act of bankruptcy, they declare and adjudge him a bankrupt generally, before the date and suing forth of the commission, without specifying the time more precisely. This declaration upon their part is merely discretionary and for caution, the statutes having no where directed them to make it, and it is not ultimately binding upon anybody (3). They are authorized, at the same time, to issue a warrant under their hands and seals, for the seizure of all the bankrupt's books, papers, and writings in his custody or possession, and for that purpose to enter, and in case of resistance to break open the houses or other places belonging to the bankrupt where any such effects are or are suspected to be, but they cannot break open any but the bankrupt's house. (4)

5. The assignment and its effects.

We have, fifthly, to consider the effect of the assignment by the commissioners to the assignees. The statute 5 Geo. 2. c. 30. s. 30. enables the commissioners immediately to appoint a provisional assignee, but this is not necessary except to prevent the

(1) 3 Campb. 58. 1 Taunt. 71.

(2) 1 Ves. jun. 157. 1 Vern. 152. As to who may sue out a commission, 19 Ves. 473. 2 Dowl. & R. 304. After discharge under insolvent act, creditor of insolvent may sue out commission against insolvent, though his debt be in-

cluded in schedule, if ignorant of bankruptcy. 4 B. & A. 256. 5 M. & S. 161. Commission may be taken out by executor before probate. 3 Mad. 241.

(3) Good. 36. 48. Cullen, 77. 78.

(4) 2 Show. 247.

effect of an extent on behalf of the crown. In general the commissioners, immediately after declaring the person a bankrupt, appoint a time and place for the creditors to meet in order to chuse assignees, to whom, when chosen, the commissioners are to assign the bankrupt's estate and effects. The effect of the assignment is to vest in the assignees, as trustees for the creditors, every possible kind of legal property or equitable interest, whether in possession or expectancy, and all things in action which relate to the real or personal property (1). But a right of action for slander, or for an assault, is not vested in the assignees, because these are not the subject of property, but are only rights to compensation for a mere personal injury, which in its own nature cannot pass to a representative. (2)

The assignment,
and its effects.

It would be impracticable here to state all the different points which may arise with respect to the property which is vested in the assignees by the assignment of the commissioners; generally speaking, by the assignment all the bankrupt's property, whether abroad or at home, passes (3), and his after-acquired personal property and debts pass in the like manner (4). There are two branches of that subject, however, of considerable practical importance, which it may be useful shortly to consider; namely, with respect to payments and delivery of property to a creditor in contemplation of bankruptcy, by way of fraudulent preference, as it is usually termed, and also with respect to property in possession of bankrupt, as reputed owner.

All dispositions of property made in contemplation of bankruptcy, though without deed, whether by a payment, or by delivery of a written instrument, as a note, bill of exchange, or even goods, or by suffering them to be taken in execution, though they are not acts of bankruptcy in themselves, yet if they are made voluntarily to prefer a particular creditor, in contemplation of an impending bankruptcy, and with a view to defeat the consequences of it, are held to be void, as frauds upon the general spirit and policy of the bankrupt laws (5); and this,

Of fraudulent
preferences.

(1) As to effect of the assignment.
1 B. & A. 593. As to liability
of assignees for interest. 18 Ves.
245. Assignee becoming bankrupt.
2 Mad. 470.

(2) Sir W. Jones, 215.

(3) 4 T. R. 182.

(4) 7 East, 53.

(5) What a fraudulent prefer-
ence. 6 B. & A. 5. 2 Dowl. &
R. 310.

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though made for a valuable consideration, and *bonâ fide*, and however moral the act (1) as between the parties, and though the insolvency or embarrassments of the bankrupt are not known to the creditor, and though the act of delivery or transfer of the property is completed before the bankruptcy. But if the preference is not the mere voluntary act of the party, but only consequential, as it is called, as where the act done is in the ordinary course of business, and upon the application of the creditor, or in pursuance of some prior agreement (2) which was not made in contemplation of bankruptcy, or where done to deliver the party from legal process, or from the threat or apprehension of it, or even from the pressure or importunity of the creditor (3), then it will not be void though made the very moment before an act of bankruptcy committed. And where the preference is consequential, merely the creditor's or bankrupt's own knowledge or apprehension of his insolvency is immaterial, that being frequently the very reason of the creditor's taking such measures against the bankrupt as are precisely the ground of justifying the act done by the bankrupt in consequence of it (4). The rule upon this subject has been laid down very clearly in the case of *Hartshorn* and another v. *Hodden* (5): the court said, it is admitted that a trader cannot in contemplation of bankruptcy dispose of his goods of his own accord, without application on the part of his creditor; but it is not sufficient to avoid the delivery of goods by trader, that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues, it must also appear that he had the bankruptcy in contemplation at the time of the delivery. Nor has it ever been held that if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt shall be called in to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in contemplation of the bankrupt, this will not vitiate the proceeding. And where (6) the act of delivering goods by a trader to secure the defendant, who was under acceptances for him payable at a future day, was clearly not voluntary on the trader's part, but made in consequence of the urgency of the defendant, evidenced by the pro-

(1) 18 Ves. 342.

(2) 6 B. & A. 5. 2 Mad. 192.

18 Ves. 229. 2 Dow. & R. 25.

(3) 1 Stark. 88.

(4) See *Cullen*, 280, 281.

(5) 2 Bos. & P. 585.

(6) 11 East, 256.

posal of giving such security originating with him, it is immaterial to consider whether the trader had his bankruptcy in contemplation at the time; nor will the transaction, being *bonâ fide* and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world.

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By statute 21 Jac. 1. c. 19. s. 11. reciting, that it often falls out that many persons, before they become bankrupts, convey their goods to other men upon good consideration, yet still keep the same, and are reputed the owners thereof, and dispose of the same as their own; it is enacted, “ that if any person at such time as he shall become bankrupt shall, by the consent and permission of the true owner and proprietor, have in his possession, order, and disposition any goods or chattels whereof he shall be reputed owner, and take upon him the sale, alteration, or disposition as owner, the commissioners shall have power to dispose and sell the same for the benefit of the creditors seeking relief under the commission, as fully as any other part of the estate of the bankrupt. It was formerly a question whether the preamble did not restrain the enacting part of this section, and confine its operation to property originally belonging to the bankrupt, and remaining in his possession after a conveyance of it to another; but it has since been adjudged that it did not, and that it extended to the goods of other persons, which are permitted to remain in the possession of the bankrupt, and whereof he may be permitted to take upon himself the sale, alteration, or disposition, as owner (2). The general view of the provision now under consideration was, to prevent traders from gaining a delusive credit from a false appearance of their circumstances, to the misleading and deceit of those who should trade with them. Choses in action fall within the description of goods and chattels mentioned in this clause (3). Mortgages or sales upon condition of goods and chattels are within the statute, as well as absolute sales (4); and a mortgage by one partner to another of a moiety of stock in trade is not distinguishable from a mortgage to a stranger, if the mortgagor is suffered to continue in possession as visible partner. The principal difficulty

Of property in possession of bankrupt as reputed owner. (1)

(1) See 1 Selw. N. P. 206.
(2) Cowp. 232.

(3) See 1 Selw. N. P. 206.
(4) 1 Atk. 182.

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in deciding questions on this statute lies in ascertaining whether the bankrupt is reputed owner or not. When this fact is settled, the application of the statute is easy; for from the reputed ownership and false credit arises the mischief, and to that mischief the remedy of the statute applies. These questions have much more of fact in them than law (1); and it would indeed far exceed the limits of this work to enter into all the cases in detail which have been decided with reference to this important question; it must here suffice merely to point out the most recent ones, where the clear and elaborate judgments of the judges will fully disclose the law on the subject. (2)

Where a bankrupt is in the possession of the goods of another *bonâ fide*, with the owner's consent, at the time of the bankruptcy, for a specific purpose, beyond which he has no right of disposition or alteration, that is not such a possession as entitles the assignees to recover the value of them under the statute (3). Goods were sent from London to Sunderland upon sale or return, and a letter inclosing an invoice, requested by the buyer, to return such of them as were not approved by him in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th November, and on the following day he committed an act of bankruptcy. In an action of trover brought by the seller against the assignees, to recover these goods, it was held, that they did not pass to such assignees under the statute 21 Jac. 1. c. 19. s. 11., as the bankrupt should have been allowed a reasonable time to have selected such goods as he was disposed to retain (4). So where A. and B. came to this agreement, that B. should purchase of A. the light gold coin which he could send at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale, and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which

(1) Per Buller J. in Dougl. 319. 9 East, 241.

(2) As to what is a reputed ownership, see 8 Price, 256. 2 B. & A. 193. 2 Brod. & B. 114. 5 M. & S. 228. 8 Taunt. 76. 1 Dow. & R. 587. 205. 1 Barn. & Ves. 308. 2 Dow. & R. 495. The registry act does not repeal effect of 21 Jac. 1. c. 19. s. 11. Id. *ibid*.

Goods in possession of executor *de son tort*, within meaning of statute, 3 B. & A. 135; and see cases collected in 1 Selw. N. P. 207 to 224. Cullen, 286 to 322.

(3) 3 Term Rep. 316.; but see the opinion of Lawrence J. 7 Term Rep. 237.

(4) 1 Moore, 519.

A. was to remit value. After they had acted under this contract for some time, B. became bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a quantity of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees. It was held, that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after the bankruptcy, on the ground that they were sent for the particular purpose of paying these acceptances, and that as that purpose was not answered, the property in the gold, &c. remained in A., for whom B. should be considered as the factor or banker (1). Where A. and B., co-partners in trade, borrowed a check for £200 from C., for the express purpose of enabling them to liquidate the balance of an account with their bankers, but before the check was presented they committed an act of bankruptcy, and afterwards returned the check to C., declining to make any use of it; it was decided that the check did not pass to the assignees, so as to enable them to recover the amount in trover. (2)

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A customer paying bills not due into his bankers' hands in the country, who credited their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of his bankruptcy; and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer in an action for money had and received (3).^{*} If A. and B. have a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other securities deposited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly (4). But in equity it has been held that a bill lodged in a banker's hands, to be applied

(1) 5 Term Rep. 215. 2 Hen. Bla. 501.

(2) 2 Dowl. & R. 25.

(3) 9 East Rep. 12.

(4) 5 Term Rep. 494.

The assignment, for a particular purpose, but not so applied, is claimable on the
and its effects. banker's becoming bankrupt. (1)

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A debt due to a bankrupt, as trustee for another, does not pass under the assignment of his effects by his commissioners (2); therefore a bankrupt, having previously assigned a chose in action on a valuable consideration, may sue the debtor in his own name for the benefit of the assignee (3): and the action must be in the name of the bankrupt; it will not lie in the names of the assignees under the commission (4). Where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it, by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and bullion, who sold the whole and received the proceeds; it was held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money (5). A. desires leave to place certain long bills in B.'s hands, and to be allowed permission to draw without renewals bills of shorter dates, and desires B. to calculate the sum to be drawn for allowing commission, and the long bills indorsed by A. are enclosed to B. in the same letter; B. answers, that agreeable to A.'s wishes he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills; and B. having accepted A.'s bills, therefore B. having become bankrupt, whereby A.'s bills were dishonoured, and the long bills have remained in B.'s hands at the time of his bankruptcy; it was held that A. might recover the amount of them, as money had and received to his use (6). If A. deposit bills indorsed in blank with B. his banker, to be received when due, and carried to his account, and the latter raise money upon them, by pledging them with C., another banker, and afterwards become bank-

(1) 2 Maddox, 192; and see & Pul. 40.
18 Ves. 229.

(2) 1 Term Rep. 619.

(3) 1 Term Rep. 619. 3 Bos.

(4) 3 Bos. & Pul. 40.

(5) 3 Maul. & Selw. 562.

(6) 1 East Rep. 544.

rupt, A. cannot maintain trover against C. for the bills (1). A., B., C., and D., were partners in a banking-house at Liverpool, and C. and D. also carried on a separate mercantile concern in London; J. S. having accepted bills payable at the house of C. and D., employed A., B., C., and D. to get them paid accordingly, and agreed to deposit with them good bills indorsed by him for the purpose of enabling them so to do; A., B., C., and D. debited J. S. in account for his acceptances, and credited him for all the bills he deposited; some of the bills so deposited by J. S. were remitted by A., B., C., and D. to C. and D. upon the general account between the two houses; and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay all his own acceptances. It was held, that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A., B., C., and D.; and it was also held that it made no difference that one of the bills remitted did not arrive in London until after the bankruptcy of C. and D., though sent by A., B., C., and D. before the event (2). A person having three bills of exchange, applied to a country banker, with whom he had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured; it was held that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange; and it was also held, that if the exchange had been complete, still that the banker having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy within the statute of James (3). If money received by an overseer of the poor be kept apart from his general property, his assignees under a commission of bankruptcy cannot claim it. (4)

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We have now to consider what debts are proveable, and the mode of proof. The law upon this subject has at different times undergone great changes and improvement; it should seem to be desirable, on the one hand, that all persons who have any demand or right of action whatever against a bankrupt should be afforded the means of obtaining their proportion of satisfac-

Of the proof of
debts under
commission.

(1) 1 Bos. & Pul. 649.

(2) 1 Bos. & Pul. 539.

(3) 2 Barn. & Ald. 327.

(4) 1 Term Rep. 370.

* Poof of debts.

tion out of the estate of the bankrupt, without being compelled to resort after the bankruptcy to the bankrupt himself, who being stripped of his property, must in general be unable to satisfy their demand; and, on the other hand, it seems but equitable that the bankrupt who is deprived of all his property for the general benefit of his creditors, and has duly conformed and obtained his certificate, should be relieved from all further liability, and not be liable to be sued upon any engagement which he contracted anterior to his bankruptcy; if he were totally released from future liability, he would be more likely to exert himself in the acquisition of future property, and thus become a useful member of society, than when he continues liable to satisfy out of such future earnings pre-existing demands. But our bankrupt laws do not thus afford a complete absolution from all previous demands. They are in this respect defective; but by the late statutes introduced by Sir Samuel Romilly, our municipal code has been greatly improved.

Previous to the statute 7 Geo. 1. c. 31. no debt could be proved unless it were due at the time of the act of bankruptcy; but by that statute it is provided that creditors should be allowed to prove their bills, bonds, notes, or other securities, promises or agreements for the same, in like manner as if they were payable presently, and not at a future day, and the statute authorizes them to receive a dividend, deducting interest, and directs that the bankrupt obtaining his certificate shall be discharged from future liability to pay such debts; but this statute is confined to written securities; and therefore it has been held (1) that school-money for the education, &c. of the defendant's son, payable half-yearly, is not a debt due till the end of the half-year, so as to be proveable under a commission of bankruptcy against the parent, who became bankrupt a few days before the end of the half-year, though he had just before his bankruptcy taken his son home for the holidays, the contract not being thereby put an end to, and consequently, the bankrupt's certificate under the statute 5 Geo. 2. c. 30. is no bar to an action against him for the half-year's education, &c. To remedy this defect, it was enacted by the 49 Geo. 3. c. 121. s. 9., that every person who has given credit to any person who shall become bankrupt upon good consideration, which shall not be due at the time of the bankruptcy, shall be allowed to prove such their

debts, deducting a rebate of interest for what they shall so receive, Proof of debts. at the rate of £5 per cent. in England and £6 in Ireland, to be computed from the actual time of payment to the time when they would have actually become payable according to the terms of the contract; and this statute also provides, in section 17, that annuity creditors shall prove under the commission, and that the bankrupt shall be discharged. If a demand be payable at all events, though at a future day, it may be proved under a commission of bankrupt against the debtor, or set off against an action brought by his assignees (1). A cognovit given in an action for a debt, interest, and costs, incurred after a secret act of bankruptcy, is discharged by bankruptcy and certificate (2). A defendant, against whom, in an action for damages on a tort, a verdict has been taken, subject to the award of an arbitrator, was held to be discharged from the debt by his certificate obtained before the entering up of judgment, where he had become bankrupt between the verdict and the making of the award; and that execution could not be sued out on the judgment, because the plaintiff might have proved the damages recovered under the commission by the production of the record. Nor can he support such execution for costs. (3)

The 2d section of the 46 Geo. 3. c. 135. enacts, that every person with whom the bankrupt has *bonâ fide* contracted a debt after a secret act of bankruptcy, but before the date of the commission, shall prove under the commission. This enactment does not restrain a creditor from proving, under a commission of bankrupt, a debt contracted before the act of bankruptcy on which the commission issued, but after notice of a prior act of bankruptcy. (4)

The demand to be proved must be a legal debt at the time of the bankruptcy. Therefore, covenants for the performance of acts, otherwise than for the payment of money and demands for unliquidated damages, as for non-delivering goods according to agreement which had been paid for, for the conversion of personal property, these not being in the nature of debts, are not proveable under the commission, and the bankrupt continues liable to an action for such damages, notwithstanding his certificate.

(1) 3 Term Rep. 435.

(3) 7 Price, 209.

(2) 1 Chitty's Rep. 16.

(4) 2 Maul. & Selw. 479.

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If the damages be contingent and uncertain, as in cases of tort, they cannot be proved under a commission (1). If A. lend stock to B. to be replaced as stock, without naming any particular day, and B. become a bankrupt before any request by A. to replace the stock, A. cannot come in under B.'s commission, A.'s demand in this case resting merely in damages (2). Bankruptcy is no bar to an action of trover, though the conversion happened before the bankruptcy, and though the cause of action were of such a nature, that the plaintiff might have waived the tort, and proved his demand as a debt under the commission (3). If A. give a warrant of attorney to B. to confess a judgment immediately, with a defeazance that judgment shall not be entered up until a subsequent day on a contingency, and A. become bankrupt before that day, though B. afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under A.'s commission (4). A cognovit is not discharged by bankruptcy and certificate, it being only an acknowledgment of the amount of the damages (5). A covenant in an indenture made between A. and B. (assigning to A. £4,350 payable under articles of agreement by J. S. to B. by instalments), that in case the said sum or any instalments thereof should not be paid to A. at the times and in the manner provided for by the articles, B. would upon demand pay to A. the said sum, or so much thereof as should not be paid at the time, was held not to be discharged by the bankruptcy of B. as to any instalments accruing due after the bankruptcy, this not being a matter proveable under the commission either by s. 9. or s. 17. of 49 Geo. 3. c. 121. (6) The obligee in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate. It was held that the parish officers were not thereby precluded from recovering upon the bond further expences incurred subsequently to the bankruptcy (7). A specific sum of money received by an overseer of the poor is not such a debt as can be proved under a commission of bankrupt against him, before his accounts are delivered in (8). A right of action on a breach of covenant not secured

(1) 6 Term Rep. 695. 1 H. B. 29.

(2) 4 Term Rep. 570. overruling 3 T. R. 539.

(3) 6 Term Rep. 695.

(4) 8 Term Rep. 386. 4 Term Rep. 570. 3 Term Rep. 539.

(5) 2 Taunt. 68.

(6) 5 Maul. & Selw. 21.

(7) 1 Barn. & Ald. 491.

(8) 1 Term Rep. 369.

by a penalty, and where the damages to be recovered are uncertain, is not barred by the certificate of the defendant, who became a bankrupt after the covenant was broken (1). Although a verdict for damages be obtained before an act of bankruptcy committed by the defendant, if final judgment be not signed until afterwards, the debt cannot be proved (2). A bond was conditioned for the payment of a sum of money to executors of the obligor, and of the interest during his life, payable on certain days, or within twenty days after demand; the obligee became bankrupt, and interest was then due, but no demand had been made; it was held, there having been no forfeiture, that the bond did not constitute a debt proveable under the commission, and held secondly, that it was not proveable as an annuity bond within the meaning of 49 Geo. 3. c. 121. s. 17. (3) A debt due on a judgment signed in an action for damages after an act of bankruptcy committed by the defendant, and a commission issued thereon, is not discharged by the certificate. though the verdict was obtained before the bankruptcy (4). A bond and warrant of attorney to confess a judgment, given by a bankrupt after his bankruptcy in order to obtain his liberty, is not barred by his certificate, although the original debt were contracted before. (5)

By the 49 Geo. 3. c. 121. s. 19. it is enacted, that in all cases in which a commission of bankrupt shall be sued forth against any person after the passing of this act, and such person shall be entitled to any lease or agreement for a lease, and the assignees shall accept the same, and the benefit therefrom, as part of the bankrupt's estate and effects, the bankrupt shall not be or be deemed to be liable to pay the rent accruing due after such acceptance of the same as aforesaid; and after such acceptance, the bankrupt shall not be liable to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; provided that in all such cases as aforesaid, it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the assignees shall decline, upon their being required so to do, to de-

(1) 6 Term Rep. 489.

(3) 2 Barn. & Ald. 802.

(2) 14 East Rep. 197. 2 Maul. & Selw. 70.

(4) 2 Maul & Selw. 70.

(5) 1 Term Rep. 715.

Proof of debts. mine whether they will or will not so accept such lease or agreement for a lease, to apply by petition to the lord chancellor, lord keeper, or lords commissioners of the great seal, praying that they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised or intended to be demised, who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding on all parties.

Under this section the general assignment does not absolutely vest the term in the assignees, and they are not bound to accept the term (1); but they should make their election promptly, and having once made it they must abide by that decision. Various decisions have taken place as to what shall amount to an acceptance of the lease by the assignees. The act of putting up the bankrupt's interest in the lease to sale is not of itself sufficient to make the assignees liable (2); But the acceptance of rent, &c. does (3). And any intermeddling with and assuming the management of a farm will render them liable (4). The entering upon, and taking possession of the bankrupt's leasehold premises, although the bankrupt's effects are upon those premises, and the assignees deliver up the keys immediately after the effects are sold, is sufficient to make them liable on the covenants in the lease (5). Assignees selling the bankrupt's reversionary interest of premises, of which he has also a lease, amounts to an acceptance (6). And if assignees refuse to give up possession of premises, this will be proof of acceptance. (7) This section does not apply to collateral securities or to an assignee, but is confined to the case of a lessee, and where the plaintiff or lessee assigned his term to the defendant, who thereupon gave to the plaintiff a bond to indemnify him against the rent and covenants in the lease, the bond was forfeited, the defendant afterwards became bankrupt, and the assignee accepted the lease; it was held that the plaintiff could recover on the bond, as he had not actually made any payment before the bankruptcy, and was therefore unable to prove under the commission, and as the court considered the stat. 49 G. 3. c. 121. s. 19. not to apply

(1) 1 Barn & Ald. 593. Peake,
238. 1 Esp. 223. 7 East, 335.
3 Campb. 340.
(2) 7 East, 335.
(3) 1 B. & A. 593.

(4) 7 Taunt. 206.
(5) 1 B. & A. 303.
(6) 2 Stark. 309.
(7) 2 Stark. 535.

to collateral securities, or to an assignee, but to be confined to the case of a lessee (1). The landlord may file a bill to compel the assignees to accept or not. (2) Proof of debts.

Another class of cases is provided for by the last-mentioned act. Before this statute, a surety who had been compelled to pay the debt of his principal, the bankrupt after the act of bankruptcy could not prove his demand unless he had taken a cross bill of exchange, promissory note, or bond of indemnity, so as to constitute a counter security, proveable under the statute 7 Geo. 1. c. 31. (3); but by section 8. of the 49 Geo. 3. c. 121. it is enacted, that where at the time of issuing the commission, any person shall be surety for or be liable for any debt of the bankrupt, it shall be lawful for such surety to prove his demand under the commission, though he has not been compelled to pay the debt till after the issuing of the commission, and the certificate shall be bar to any future action against the bankrupt." By this enactment the certificate is no bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the nonpayment by the bankrupt of such debt when due. Therefore, where the acceptor of an accommodation bill brought an action against the drawer, after he had become bankrupt and obtained his certificate, for not providing him with funds, whereby he had incurred the costs of an action, and been obliged to sell an estate in order to raise money to pay the bills, it was held that the certificate was a good bar to the action (4); but the debt must exist at the time of issuing the commission, and be of such a nature as *debitum in præsentì solvendum in futuro*, and must not entirely sound in damages. A surety in an annuity deed, who is compelled by the annuity creditor, after the bankruptcy and allowance of the certificate of the principal, to pay several sums for arrears due after the issuing of the commission, is not within stat. 49 Geo. 3. c. 121. s. 8., and therefore may have an action against the principal for such sums, and hold him to bail (5).

(1) 8 Taunt. 315.

(2) 1 Rose Rep. 445. 1 Maddox, 76.

(3) The cases upon this subject are very clearly stated in Mr. Culen's Bankrupt Law, in 126 to 138.

(4) 3 B. & A. 13. 2 Moore, 602. 8 Taunt. 550. S. C.

(5) 4 Maul. & Selw. 332.; and see the same point in 3 Barn. & Ald. 186.

Proof of debts. Where the plaintiff before the bankruptcy of defendant was his surety for the performance of articles of agreement, by which an annual rent was to be paid by the defendant, and after the bankruptcy rent became due by the defendant, which the plaintiff paid, as well as the costs of an action against the plaintiff as surety, it was held that the plaintiff was not a surety for or liable to a debt due at the time of issuing the commission, and that he was not therefore within this enactment (1). Before this act a surety who did not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, might hold the principal to bail, notwithstanding his certificate, for as the debt did not arise till the money was paid, it could not be proved under the commission (2). Bail are not to be considered as sureties for or as liable for the debt of a bankrupt within the meaning of this statute. (3)

Before the statute 49 Geo. 3. c. 121. s. 14., if a creditor paid a debt under a commission, it was not considered a conclusive election to take under a commission; and if such creditor had arrested the defendant, the courts of common law would not interfere. (4)

The statute 49 Geo. 3. c. 121. s. 14., which enacts that creditors proceeding under the commission shall be deemed to have made their election not to sue, does not extend to prevent a creditor who proves a joint debt under a commission against one partner from suing the others (5). It seems that the proving a debt under a commission is an election by the creditor within the statute 49 Geo. 3. c. 121. s. 14., which deprives him of his remedy by action against the bankrupt in the cases excepted in statute 5 Geo. 2. c. 30. s. 9. (6) The drawer of a bill of exchange, who has paid the amount to the holder after a commission of bankruptcy issued against the acceptor, may sue the acceptor before he has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission (7). If a creditor has both proved his debt under a commission of

(1) 8 Taunt. 584.

Rep. 364.

(2) 1 Term Rep. 599.

(5) 4 Taunt. 326. 16 East

(3) 2 Marsh. 192. S.C. 6 Taunt. 329.

Rep. 252.

(6) 3 Maul. & Selw. 78.

(4) 1 Bos. & Pul. 424. 8 Term.

(7) Id. 91.

bankrupt, and commenced an action against the bankrupt before the passing of the statute 49 Geo. 3. c. 121. s. 14., that act does not compel him to relinquish his action (1). Where the plaintiff in an action against a bankrupt makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion recording the election put on the record (2). Two parcels of goods were sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt, the vendors proved under the commission for the amount of the first parcel, they then holding the bill given in payment for the same; the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonoured: it was held that the vendors were not precluded by the statute 49 Geo. 3. c. 121. s. 14. from suing the bankrupt for the amount of the last parcel of goods (3). A person to whom several debts were due from a bankrupt, arising out of separate sales of goods, proved some of the debts under the commission; another person, who was suggested to be a trustee for him, sued at law upon a note which the bankrupt had given for other part of the goods sold: the court of common pleas refused to interfere in a summary way to stay proceedings on the bail bond in this action. (4)

No unnecessary delay should take place in making the proof; and in some cases, if the proof be delayed till after a dividend has been declared, though not received, it will prevent the holder from proving the whole amount of his bill under a commission against another person (6). Formerly, creditors were allowed to come in and prove their debts at any time within four months, and until distribution made, but they were not admitted after distribution actually made of any part of the estate; but now, except in case of gross laches, creditors are allowed to come in at any time while any thing remains to be divided (7). And *in re Wheeler* (8) it was decided, that a creditor coming in to prove his debt after a dividend made (provided the delay was not fraudulent, but owing to accident or unavoidable circumstances) should be put on a footing with the other creditors,

Proof of debts.

6. The time and mode of proof and making claim. (5)

(1) 2 Taunt. 181. 246.

(2) 6 Taunt. 549.

(3) 1 Barn. & Ald. 121.

(4) 5 Taunt. 174.

(5) Clitty on Bills, 465.

(6) 6 Ves. 645.

(7) 1 Atk. 111. 208. 79.

(8) 1 Sch. & Lef. 242.

Time and mode
of making proof.

before any further dividend was made. A creditor who has neglected to prove before a meeting to declare a second dividend is, in strictness, only entitled to be paid future dividends, *pari passu*, with the other creditors (1); but it is the practice to permit such creditors to be paid former dividends rateably with those who have been paid, and then to direct a general distribution of the residue (2). Where a creditor has a reasonable cause for not having proved in time to receive a first dividend, he is upon proving entitled first to be placed on an equality with the other creditors who received a first dividend, but not so as to disturb a former dividend, and then to receive the future dividends rateably with the other creditors (3). The mode of being admitted to receive in respect to former dividends is, by making an affidavit of the cause of delay, and by petition to the chancellor, upon which an order may be obtained, and the assignees should not pay without it (4). If a surety pay the debt of his principal after a commission against him, he may at any time prove under the commission, not disturbing the former dividends, and receive a dividend or dividends proportionably with the other creditors. (5)

Where a party may not be able to swear to the precise amount of his debt, secured by a bill or note, it is advisable for him to make a *claim*, as a means of securing a dividend when his proof is afterwards established, without the necessity of applying to the chancellor; and when a proper claim has been made, the dividend must be apportioned for it, and be withheld until the validity of the claim has been ascertained. (6)

The debt must in general be proved by the person in whom the *legal* right to the debt is vested; when a bond has been assigned, it must be proved by the assignee, and the assignor must join in the deposition (7). The debt must be proved at a public meeting of the commissioners: the usual proof is, the oath of the creditor; but the commissioners may examine, by any other means they may think fit, any person, for the discovery of the truth and certainty of the several debts due to every creditor

(1) 2 Bro. 50. 1 Atk. 208. (5) Chitty on Bills, 453, 454.
2 Ch. Ca. 153. 49 Geo. 3. c. 121. s. 8.
(2) Cooke, 521. 1 Mont. 556. (6) Cooke, 255. 1 Mont. 459.
(3) 2 Bro. 50. 2 Atk. 208. 553.
(4) 1 Mont. 556. (7) Cooke, B. L. 145.

who seeks relief under the commission; and it has been held, that the commissioners are not bound to believe the oath of the creditor, but may admit his demand as a claim, or may totally reject it, according to the weight which they give to the oath. (1)

Time and mode
of making proof.

We have lastly to consider the conduct of the bankrupt, his certificate, and its effect. The 5 Geo. 2. c. 30., and other statutes, point out his duty, and the consequence of his non-observance. He will be guilty of felony without benefit of clergy, if he do not within forty-two days after notice of the commission, and of the time and place of the meeting of the commissioners, surrender himself to them, and conform to the several statutes concerning bankrupts, and make full disclosure upon his examination of all his effects, real and personal, and of all dispositions of his property, and deliver up to the commissioners all his goods, books, papers, and property, except the necessary wearing apparel of himself, his wife and children, or if he embezzle or conceal any property to the value of £20. It appears from Perrot's case (2), that if the bankrupt has not made a disclosure of his property to the satisfaction of the commissioners, they may commit him to prison until he has made such disclosure. A bankrupt who persists in refusing to make a due disclosure may in effect be imprisoned for life. But in a late case it has been held (3), that a bankrupt who has surrendered to his commission is not guilty of felony within the 5 Geo. 2. c. 30. s. 1., though he refuse to answer questions concerning his property; but the bankrupt is bound to render to the commissioners an account in writing of his estates and effects, if required to do so (4). Where a bankrupt, on the day appointed by the commissioners for his last examination before them, promised to produce a balance sheet if further time were allowed him, and several adjournments took place during a period of ten months, at which adjournments he represented an account in writing to be necessary in order to make the discovery required of his estate and effects, and promised from time to time to produce the balance sheet; on his not finding it at the last adjournment, and assigning no sufficient reason for not doing so, the commissioners are justified in committing him (5). So if upon the examina-

7. Duties of
bankrupt.

(1) Atk. 71.

Justices dissentiente.

(2) 2 Burr. 1122.

(4) 4 B. & A. 356.

(3) 1 Brod. & B. 308. Three

(5) Id.

Duties of bankrupt.

tion of a bankrupt touching the disposition of his property, he swear to an account of the same which appears to be incredible, the commissioners may commit him to prison. (1)

8. The certificate, and its effect.

By 5 Geo. 2. c. 30. a bankrupt surrendering to his commission, making a full discovery of his effects, and in all things conforming to the directions of the act, may, with the consent of his creditors, obtain a certificate from the commissioners of such his conformity, which, when allowed and confirmed by the lord chancellor, discharges his person, and whatever property he may afterwards acquire, from debts owing by him at the time he became bankrupt. In order, however, to prevent either the granting or withholding of such certificate from being perverted from its original purpose, or being made the instrument either of fraud upon the creditors or of oppression upon the bankrupt, the act has been particularly careful in requiring a number of forms to be observed, and conditions to be complied with, before it can either be obtained at all in the first instance, or be of any avail afterwards, when the bankrupt may have occasion to make use of it (2). The guards which for these purposes have been put upon it by the legislature respect, 1st, The persons whose concurrence and authority is required to the signing of it originally; 2dly, The superintendence and controul of the great seal in the subsequent allowance and confirmation of it. The certificate must be signed by the creditors and by the commissioners, and must be allowed and confirmed by the lord chancellor. No bankrupt is entitled to the benefits of the act unless four parts in five, in number and value, of his creditors, who shall be creditors for not less than £20 respectively, and who shall have duly proved their debts under the commission, or some other persons by them duly authorized, shall sign the certificate, and testify their consent to his having the benefit of it, and being discharged in pursuance of the act (3). As the signing is optional in the creditors, so it is discretionary on the part of the commissioners to determine whether the bankrupt, upon examination before them, has made a full discovery, and in all things conformed to the directions of the act; and whether they have any reason to doubt of the truth of such discovery is altogether a matter of judgment, and left to their discretion. After it has

(1) 6 Term Rep. 118.

(3) Cullen, 373. 456.

(2) See Cullen, 372 to 373.

been signed by the commissioners, the certificate, together with an affidavit by the bankrupt that it was obtained fairly and without fraud, must also be laid before the lord chancellor, in order to be by him allowed and confirmed. This power also, like that of the commissioners, as to the signing of it originally, though discretionary in the lord chancellor, is to be exercised not in an arbitrary but in a discreet and equitable manner, according to the behaviour of the bankrupt. (1)

The certificate, and its effects,

Unless the bankrupt has obtained this certificate he cannot retain any property against his assignees. (2)

A second commission cannot be supported against a bankrupt who has not obtained his certificate under the first. All the property of an uncertificated bankrupt, whether what belonged to him at the time of the first commission, or what he has obtained since, belongs to his assignees under the first; the second commission has therefore nothing to operate upon, and all the proceedings, and the certificate under it, are void (3). But lord Hardwicke refused to supersede a second commission upon this ground, where it appeared the creditors under the first had signed the certificate, and acquiesced for a length of time under the second. (4)

With respect to the effect of the certificate, we have already, in considering what debts may and must be proved, necessarily considered the general rule as to the effect of a certificate. Most of the statutes which have given the power to prove, contain a clause imperative upon the creditor to do so; and the general rule certainly is, that when a creditor can prove, the bankrupt will be protected by his certificate from all future liability (5); on the other hand, the bankrupt's remaining still liable, and the creditor's not being able to prove under the commission, are convertible terms (6). Thus demands for damages, which we have seen cannot be proved, still constitute a demand

(1) 1 Atk. 82.

(2) 3 B. & A. 225.

(3) 1 Atk. 252. 4 Bro. 210, S. C. 2 Ves. jun. 67.

(4) 1 Atk. 252. Dav. Bankrupt Laws, 440.

(5) See 1 Atk. 119. 3 Wils. 13. As to certificated bankrupt being witness, 1 B. & C. 163. 2 D. & R. 350.

(6) 7 T. R. 565.; and see 49 Geo. 3. c. 121. s. 14. 1 Rose, 204. 2 Bos. & P. 11.

The certificate, and its effects, upon the bankrupt, notwithstanding he may have obtained his certificate.

The statutes which enable the holder of a bill to prove in particular cases, contain a clause that, in cases where the holder could avail himself of the proof, the certificate shall protect the bankrupt from all further responsibility; and the statute 49 Geo. 3. c. 121. s. 8. having enabled sureties to prove in various instances where he has been compelled to pay the bill or note after the issuing of the commission, has greatly enlarged the effect of the certificate. There are, however, still some cases relating to bills and notes, in which the certificate will not be a bar to any future action. Thus, if the bill or note were drawn and payable in England, and the cause of action accrue here, a certificate abroad will not be any bar to an action in this country, although at the time of making the contract the bankrupt resided abroad, in the country where he afterwards obtained his certificate (1); but where the cause of action accrues abroad, a certificate in the country where the cause accrued is a bar to any action in this country (2). And if a bill of exchange, drawn in Ireland upon a person resident in Ireland, be accepted, and the acceptor becomes a bankrupt in Ireland, and there obtain his certificate, and afterwards be proceeded against in this country upon the bill, the court will order an exoneration to be entered on the bail piece, on the ground, that as the debt was contracted in Ireland, where the commission issued, it was discharged by the certificate (3). And if a person draw a bill in America, in favour of a firm in America who have also a house in London, upon a person residing in London, and the bill be refused to be accepted, and notice of refusal is given to the drawer in America, and the drawer afterwards become a bankrupt, and obtain his certificate in America, it is a bar in this country to any action against the drawer (4). A bill drawn in Ireland, and accepted and paid by plaintiffs in England, is a debt contracted in England, and cannot therefore be discharged by certificate under Irish commission (5). The general rule of law is, that *debitum et contractus sunt nullius loci*, and that the payment of a debt, wherever it may have been contracted, may be enforced

(1) 2 Hen. Bla. 553. 8 T. R. 609. 1 East, 6.; but see 2 Stra. 733.

(2) 5 East, 124.

(3) Cooke, 115.

(4) 5 East, 124.

(5) 4 B. & A. 654.

in any country, and consequently, whenever a creditor might prove under a commission abroad, it should seem on principle that a certificate should be a bar to every debt wherever it was contracted; but, on the other hand, great inconveniences might ensue from fraudulent certificates in remote countries, being obtained before a creditor here could be apprized of the proceeding, and therefore, unless the contract was made, or at least in some measure connected with the foreign country, he should not be prejudiced by such certificate. When a certificate abroad operates as a discharge in this country, it seems that the extent of the discharge will depend upon the law of the country where the certificate is obtained (1). Where a bankrupt is discharged by his certificate from a debt in one form, he cannot be charged by the creditor from the same debt in another form of action; and therefore, where (2) by agreement between the plaintiff's bankers at Carlisle, and the defendant's bankers at Newcastle, the plaintiffs were weekly to send to the defendants all their own notes, and the notes of certain other banking-houses, and the defendants were in exchange to return the plaintiffs their own notes, and notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs at a certain date; it was held that the notes so sent by the plaintiffs to the defendants constituted a debt against them, which the defendants might pay by a return of notes according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable, and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants, who had obtained their certificates. But in some cases, a creditor has an election to shape his demand on the bankrupt, either as a debt or as for a tort, and if he adopt the latter, the certificate will be no bar; thus, if a bankrupt to whom a bill has been delivered to obtain the payment when due, and to remit to his employer, discount it at a loss before it was due, and embezzle the money, if sued for this tort, his certificate would be no bar (3).

The certificate,
and its effects.

(1) 1 Atk. 255. 1 Mont. 662. (3) 6 T. R. 695.

(2) 12 East, 605.

The certificate,
and its effects.

So if bills be deposited merely as a pledge, if the bankrupt pledge them as his own, he will continue liable to a special action for this tort. (1)

New contract or
promise before
or after contract.

The effect of the certificate as to a debt which might have been proved under the commission, may be avoided by a fresh contract entered into with the bankrupt *bonâ fide*, after an act of bankruptcy, even before or after he has obtained his certificate (2). All the debts of a bankrupt continue due in conscience, notwithstanding he has obtained his certificate; and though a security or a promise as a consideration for signing the certificate is void, any security given *bonâ fide*, without fraud or imposition on the bankrupt, or the rest of the creditors, is valid and binding upon him, though there be no new consideration (3). Thus where (4) the bankrupt after the act of bankruptcy, and after the issuing of the commission, but *before* he had obtained his certificate, gave a promissory note in consideration of two former bills of the bankrupt being cancelled, and of an agreement not to accept a dividend under the commission, it was held that the certificate was no bar to an action on the note; but where a commissioner of a bankrupt took a promissory note from a bankrupt, under whose commission he was acting, for a debt contracted before the bankruptcy, the note being dated after the commission issued, and before certificate was signed, it was held that no action would lie on the note (5). If a bankrupt, *after* obtaining his certificate, undertake to pay any creditor the residue of his debt, the undertaking, if made freely and without fraud, is binding (6). However, a bankrupt having obtained his certificate, is not liable upon a promise to pay a former debt, unless it be distinct, express, and unequivocal (7). If a bond for the payment of money has been forfeited before bankruptcy, it is questionable whether payment of interest by the bankrupt after certificate will render him liable to be sued on the bond (8). If the promise be to pay when he is able, the plaintiff must prove ability at the time of action brought (9). A bankrupt who has obtained his certificate cannot be arrested

(1) Dougl. 167. Cullen, 113.
391.

(2) Cullen, 386. 1 Mont. 586.

(3) Cowp. 544. 1 T.R. 715.

(4) Cowp. 544.

(5) 1 Dowl. & R. 411.

(6) Id. ib. See Cullen, 386 to
388. 1 Mont. 587.

(7) 1 Stark. 370. 5 Esp. 198.

(8) Dougl. 191.

(9) 2 H. Bla. 116.

upon a subsequent promise to pay a debt due before his bankruptcy; for it is a question for a jury whether or no the bankrupt has made himself liable by a new promise, and until they have decided that question against him, he cannot be arrested or detained in custody. (1)

The certificate,
and its effects.

There are various grounds on which commissions may be superseded; such as the want of a sufficient debt of the petitioning creditor (3), or because the petitioning creditor was an infant (4), or otherwise incapable of being one, or for want of sufficient evidence of the trading, or of the act of bankruptcy (5), or because the party was in some other respect not liable to the bankrupt laws, as being an infant (6) or a feme covert (7); or in order to prevent a prosecution of the bankrupt for the felony in not surrendering to his commission (8); or in cases of fraud, as where a commission issued is not proceeded in for a length of time (9), or where it plainly appears to have been taken out fraudulently and maliciously (10). But a commission being taken out to defeat an execution subsequent to the act of bankruptcy is not for that reason alone fraudulent, if there is no collusion in the bankrupt (11). A commission issued to a place where there were only two creditors, and distant 200 miles from the great body of creditors, was refused to be superseded on that account, but the time was enlarged for the choice of assignees (12). A general affidavit by the bankrupt, that he is not one, is not a sufficient ground to supersede; he ought to give a particular answer to the facts charged in the depositions taken before the commissioners, and in the affidavits on the other side (13). A creditor who has not proved cannot petition to supersede a commission. (14)

Of superseding
commissions. (2)

(1) 6 Barn. & Ald. 116. 2 Dowl. & R. 240. S. C.; see also the cases in 3 M. & S. 595. 6 Taunt, 563. 2 Burr. 736.; and the case in 8 Price, 526. contra: but the statute 5 Geo. 2. c. 30. does not seem to have been there referred to.

(2) See Cullen, 440.

(3) 1 Atk. 147. Stra. 899. 653.

(4) 3 Ves. jun. 554.

(5) 1 Atk. 144.

(6) 1 Atk. 146.

(7) 2 Bro. 266.

(8) Cullen, 441.

(9) Sel. Ca. Ch. 46. 2 P. Wms. 545.

(10) 1 Atk. 218. What conclusive proof of malice, see 1 Swanst. 23.

(11) 1 B. & P. 369.

(12) 2 Madd. 141.

(13) 1 Atk. 241.

(14) 2 Madd. 281.

Of superseding
commissions.

A commission may also be superseded by the agreement and consent of the creditors, and regularly the actual consent of all the creditors ought to appear. But in a case where the consent appeared of all except two, who could not be found, but the notes on which their debts arose had been delivered up, with receipts upon them, a supersedeas was ordered on the terms of procuring an affidavit to verify the signatures to the receipt (1). In a later case, however, the lord chancellor refused to supersede a commission of bankrupt, without the consent of all the creditors who proved, certified by the commissioners and by an affidavit of the bankrupt's confirmation of all purchases under the commission, and the consent of creditors who had received 20s. in the pound was not dispensed with (2). Although a majority of the creditors consent, the court will postpone it, in order to give other creditors an opportunity to prove their debts who have not been able to come in sooner, and undertake to do it in a short time (3). And even though all the creditors consent, a supersedeas will sometimes be refused for the sake of the bankrupt himself. As where a bankrupt, with the consent of his creditors, who had accepted a composition, and released him by deed, applied to supersede the commission, and that he might be empowered to collect in some outstanding debts, the court directed that he should, on giving a proper indemnity to the assignees, stand in their place to get in the remainder of the debts, but would not supersede the commission, because the supersedeas would entirely defeat his certificate. (4)

It has been refused to supersede a commission merely on the ground of a misnomer in it of the bankrupt, as where a married woman was described in it as a widow (5), or where the residence of the bankrupt was misdescribed (6); but under circumstances, such a misdescription will furnish a ground for a supersedeas. (7)

In a doubtful case the court will direct an issue to try the bankruptcy (8), but not where the bankrupt has submitted to

(1) 2 Ves. jun. 40.

(2) 19 Ves. 204.

(3) 1 Atk. 135.

(4) 1 Atk. 145.

(5) 1 Atk. 208.

(6) 2 Madd. 11.

(7) See two cases in 2 Madd. 13.

(8) 1 Atk. 218.

the commission for a length of time, and upon the examination strong circumstances of bankruptcy have appeared (1), as the party is still not left without remedy, but may bring his action. Where the commission appears plainly to be taken out fraudulently or vexatiously, the court may supersede without directing an issue. (2) In a doubtful case, and where the bankrupt is out of the kingdom, the court will not supersede the commission upon petition, but direct the bankruptcy to be tried in an issue (3). And sometimes, instead of either at once superseding or directing an issue, the question has been referred back to the commissioners for further enquiry and reconsideration. (4). If the commission be not superseded, or there be no issue determined at law as to the validity of a commission, no action will be heard at law for maliciously issuing the commission. (5)

Of superseding
commissions.

A second commission, while a first is existing, is strictly speaking void, but such a commission can only be set up against a subsequent one when it is in legal operation (6); if justice can be done to the creditors and purchasers under the first commission, that commission will be supported, and other commissions cut down (7). A prior commission of bankrupt, which has never been acted upon or superseded, not being in legal operation, does not invalidate a subsequent commission (8). In an action against a bankrupt, who has obtained his certificate under a second commission, the certificate is no bar, unless it appears affirmatively that his estate has produced fifteen shillings in the pound; evidence that it probably will produce so much is not sufficient. (9)

Of second com-
missions.

Statutes are occasionally passed for the purpose of relieving and assisting insolvent persons whose transactions have not been of such a nature as would subject them to the bankrupt laws. The acts now in force regulating the discharge of insolvent

Of the insolvent
debtors acts.

(1) 1 Atk. 102.

(2) 1 Atk. 218.

(3) 1 Atk. 193.

(4) 2 Ves. 26.

(5) 7 Taunt. 400.

(6) Rose's Bankruptcy Cases,
12.

(7) Per Eldon, Ch. 1 Ves. & B.
160.

(8) 8 Taunt. 176.

(9) 16 East Rep. 225.

debtors, are the 48 Geo. 3. c. 123., which applies to prisoners in custody in England only, for small debts not exceeding £20; the 32 Geo. 3. c. 28. (1), commonly called the *lords act*, which applies to persons charged in execution in the whole for £300, or for sums on which £300 remains due; and the 1 Geo. 4. c. 119. (2), called the *insolvent debtors' act*. It would be impracticable, and indeed of very little utility in a treatise of this nature, to analyse and digest the effect and requisites of these statutes, and more especially so when they are so long, and subject to so many repeals and alterations, and the statute of 1 Geo. 4. expiring on the 1st June 1825. Suffice it to say, that by operation of these acts, the debtor, by complying with the requisites therein pointed out, will be discharged and released from custody, and the creditors are deprived of their remedy for the recovery of their debts contracted prior to the times prescribed in the act; but the future effects of the insolvent remain liable (3). The original debt may be the ground of a future promise or security (4), but such promise must not be indefinite (5), and it seems the insolvent cannot be arrested on a subsequent promise (6). The policy of these acts is, that the property of the debtor shall be divided rateably amongst his creditors, and any agreement in contravention of these acts, or in fraud of the general body of creditors, will be invalid. (7)

(1) And see 37 G. 3. c. 85. 39 G. 3. c. 50.

(2) Continues in force till 1 June 1825.

(3) 8 East, 55.

(4) 4 B. & A. 256. 8 Price, 533. Dougl. 101. n. 2 Blac. Rep. 724. 798. 6 Taunt. 563. 7 T. R. 305. 4 T. R. 825. But request must be made before action brought. 2 Blac. Rep. 724. 1217.

(5) 4 Taunt. 613.

(6) 3 M. & S. 595. 2 Stra. 1233. 2 Blac. 1217. 2 Camp. 443. 3 Bos. & P. 394. acc. Sed vide 6 Taunt. 563.

(7) See 4 B. & A. 691. 1 Brod. & B. 447. 2 T. R. 763. 4 East, 381. As to the manner of proceeding under these acts, in order to obtain the debtor's discharge, see

Tidd's Practice, 7 ed. 380 to 398. 9 Price Rep. 136. 5 Price, 648. 2 Chitty Rep. 226. 1 Dow. & R. 394. 5 B. & A. 749. 1 Dowl. & R. 539. S. C. 4 B. & A. 522. Where creditors may compel debtor to make an assignment of his property under the lords act, see 1 Dowl. & R. 25. 5 B. & A. 537. S. C. 2 Dow. & R. 165. For cases in which insolvent debtors are entitled to the benefit of these acts, see 8 T. R. 49. 2 East, 148. 3 Bos. & P. 394. 4 Taunt. 460. 854. 1 T. R. 260. 1 Moore, 494. Cowp. 136. 4 T. R. 317. 809. 7 T. R. 156. 1 Bos. & P. 336. 13 East, 190. 1 Moore, 494. 2 B. & A. 59. 7 East, 84. Barnes, 370. 1 B. & P. 336. 3 Smith, 51. 2 Blac. Rep. 760.

We have thus endeavoured to point out the principles which should influence a nation or an individual in embarking a capital in commerce. We have considered the law of nations, as it affects commerce, whether in time of peace or in war, and whether between allies, belligerents, or neutrals, and we have then enquired how far the commerce of Great Britain in particular is publicly affected by her own political regulations. We then took a comprehensive and practical view of all those municipal regulations which relate to the private interests of trade, discussing the nature and properties of contracts in general, and of every particular contract which usually occurs in the course of commerce. We have lastly endeavoured to point out concisely

Conclusion.

3 Burr. 1322. 4 Burr. 2119. 2127. 11 East, 231. 1 Bos. & Pull. 423. 8 Taunt. 57. And for those in which they are not so entitled, see 4 Burr. 2142. 6 T. R. 28. 399. 7 Term Rep. 305. 1 Bos. & P. 477. 6 East, 347. 7 East, 91. 8 East, 433. 2 Camp. 443. 1 Price, 315. 10 East, 408. Barnes, 367. Married woman, 5 B. & A. 759. Infant, 5 Maddox, 50. As to those entitled to discharge under lords act, see 4 T. R. 367. 3 Smith, 51. Cowp. 136. 13 East, 191. 1 Bos. & P. 336. And of remanding insolvent for obtaining money or goods under false pretences, or for other reasons, 6 T. R. 76. 8 East, 180. 3 Burr. 1393. 1 Bos. & P. 143. Of the effect of assignment of insolvent's property, and what passes under it, 2 East, 257. Dougl. 472. Holt, C. N. P. 161. 3 T. R. 681. 683. n. (a). 4 T. R. 248. 3 Bos. & P. 321. 1 Bing. 73. Of the rights of assignees, 2 East, 257. 2 Black. 992. 2 Smith, 1. What sufficient proof of assignment to assignee of insolvent's estate, 5 M. & S. 72. 1 Bing. 73. Of the effect of discharge as regards extinguishment of original debt, and taking out commission of bankruptcy, 4 B. & A. 256. 8 Price, 533. and note (1) ante 771. The omission to insert a bill in schedule is not evidence of payment, 3 Camp. 13. As to evidence of discharge, 3 Moore, 231. 3 Camp. 236. 13 Cas. Temp. Hardw. 145. 186. 4 Taunt. 192. 1 Bing. 73. As to the debts which they affect, 3 Barn. & Ald. 407. 2 Chitty's Rep. 222. 8 T. R. 49. 2 East, 148. Cowp. 22. Dougl. 97. 393. 669. 7 T. R. 305. 1 T. R. 80. (b). Loft. 433, 434. 650. 37. 1 Black. 372. 6 T. R. 366. 3 Bos. & P. 394. 4 Taunt. 460. 854. 1 Price, 315. 7 Taunt. 179. If creditor request insolvent not to include his debt in schedule, as he will not call on him for it, he cannot afterwards sue for it, 3 Moore, 231. As to the liability of future effects, 6 T. R. 366. 8 East, 55. 4 Taunt. 460. 2 Black. 1309. Mode of enforcing rights of insolvent debtor. 2 Black. Rep. 798. 1307. Of suits by, 1 Marsh. 477. 6 Taunt. 123. 1 Bing. 73. Liabilities and rights of sureties, 4 Taunt. 460. 2 M. & S. 551. 2 Black. Rep. 1217. Of the insolvent's allowance, see Dougl. 68. Loft. 348. 349. 5 T. R. 36. 1 New Rep. 111. Form of security for, 2 Chitty's Rep. 226. 3 Bos. & P. 184. 1 Bos. & P. 336. 1 New R. 306.

the various remedies at law or in equity, for the breach of a contract, and we have finally considered the remedies in case of insolvency. The subject we have thus investigated may justly be considered the most important branch of the law, whether we consider it with reference to professional knowledge, or, on a more enlarged scale, the welfare of our country.

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